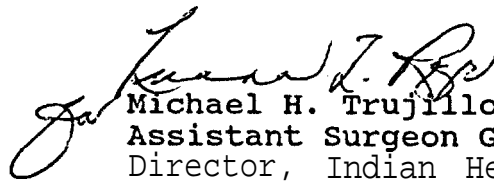

TRANSMITTAL NOTICE - INDIAN HEALTH MANUAL

TN 96-7

BACKGROUND

This is to transmit changes to the Indian Health Manual Part 5, Chapter 5, "Acquisition Management." The following changes are hereby transmitted: (1) a new Section 5-5.7AC, "Personal Services Contracts"; (2) a new Exhibit in Section 5-5.7; and (3) the changes in Section 5-5.13, "Conditions Regarding the Reimbursement of Drugs."



Michael H. Trujillo, M.D., M.P.H.
Assistant Surgeon General
Director, Indian Health Service

MATERIAL TRANSMITTED

Indian Health Manual Part 5, Chapter 5, Section 5-5.7AC, pages 7-27 thru 7-37, Manual Exhibit 5-5.7-K, and Section 5-5.13 (HH), Pages 13-49 and 13-50.

MATERIAL SUPERSEDED

Indian Health Service Circular No. 95-13, "Personal Services Contracts," and the Indian Health Manual, Section 5-5.13 (HH), Pages 13-49 and 13-50.

MANUAL, MAINTENANCE

Replace page 7-27 dated March 27, 1995, in Section 5-5.7(AC) with new pages 7-27 through 7-37. File the new Exhibits 5-5.7-K behind Exhibit 5-5.7-J. Replace page 13-49 and 13-50 dated September 30, 1994, with the attached replacement pages 13-49 and 13-50 dated June 13, 1996.

Log and file this transmittal notice in sequential order.


Distribution: PSD 557 (Indian Health Service Mailing Key)
Date : June 13, 1996

TRANSMITTAL NOTICE - INDIAN HEALTH MANUAL

TN 95-3

BACKGROUND

This is to transmit changes to the Indian Health Manual, Part 5, Chapter 5, "Acquisition Management." The following changes are hereby transmitted: 1) a new Section 5-5.7AB, "Unsolicited Proposals"; and 2) new Exhibits E - J in Section 5-5.7. The transmitted revisions are to be implemented by each Indian Health Service Area office and Headquarters to comply with Section 15.506(a) of the Federal Acquisition Regulations.



Michael H. Trujillo, M.D., M.P.H.
Assistant Surgeon General
Director, Indian Health Service

MATERIAL TRANSMITTED

Indian Health Manual Part 5, Chapter 5, Section 5-5.7AB, and Exhibits 5-5.73 through J.

MATERIAL SUPERSEDED

Indian Health Manual, Part 5, Chapter 5, Page 7-22 in Section 5-5.7 of Transmittal Notice 94-15, dated September 30, 1994.

MANUAL MAINTENANCE

Replace page 7-22 dated September 30, 1994, in Section 5-5.7 with pages 7-22 through 7-28. File the new Exhibits E through J behind existing Exhibit D in Section 5-5.7.

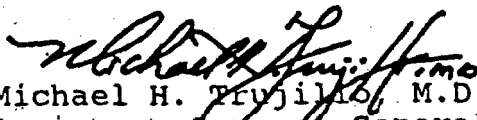
Log and file this transmittal notice in sequential order.

Distribution: PSD 557 (Indian Health Service Mailing Key)
Date: March 27, 1995

Background

This issuance establishes Indian Health Manual (IHM), Part 5, Chapter 5, entitled Acquisition Management." This chapter sets forth the policy, objectives, and responsibilities relating-to' acquisition management within the Indian Health Service (IHS). The IHM Part 5, Chapter 5. "Acquisition Management," consolidates over 75 previously issued policy statements, and reduces internal regulations within the IHS by 20 percent

The issuance of these policies also removes the material weakness in the IHS procurement function.


Michael H. Trujillo, M.D., M.P.H.
Assistant Surgeon General
Director, Indian Health Service

MATERIAL TRANSMITTED

Indian Health Manual, Part 5, Chapter 5, Acquisition Management Manual Exhibits (exhibits are included at the end of appropriate Sections)
Table of Contents

MATERIAL SUPERSEDED

See Exhibit 5-5.2-A for superseded material; for reference purposes, a copy should be filed with Transmittal Notice 94-15.

MANUAL MAINTENANCE

Make a Tab entitled "Chapter 5, Acquisition Management," and file this chapter in the IHM Part 5 - Management Services. File the Table of Contents in the appropriate section of the Table of Contents.

Record and file the transmittal notice number on the checklist in the Transmittal Notice book.

INDIAN HEALTH MANUAL PART 5, CHAPTER 5 -
ACQUISITION MANAGEMENT

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Chapter 5
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ACRONYMS USED IN THIS CHAPTER.

ACF	=	Administration for Children and Families
ADP	=	Automated Data Processing
ADPE	=	Automated Data Processing Equipment
A&E	z	Architectural and Engineering
AHCPR	=	Agency for Health Care Policy and Research
AOI	=	Acquisition Operating Instruction
APD	=	Acquisition Planning Document
APR	=:	Agency Procurement Request
ASBCA	=	Armed Services Board of Contract Appeals
ATL	L	Area Telecommunications Liaison
ATSDR	=	Agency for Toxic Substances and Disease Registry
BIA	=	Bureau of Indian Affairs
BPA	=	Blanket Purchase Agreement
CBD	=	Commerce Business Daily
c c 0	=	Chief of the Contracting Office
CDC	=	Centers for Disease Control and Prevention
CICA	=	Competition in Contracting Act
CFR	t	Code of Federal Regulations
CHS	s	Contract Health Services
c o	r :	Contracting Officer
CGPL	=	Contracts and Grants Policy Letters
CPL	=	Contract Policy Letter
CPM	s	Contract Policy Memorandum
CRB	l	Contract Review Board
DCGP	=	Division of Contracts and Grants Policy
DFSC	=	Defense Fuel Supply Center
DLA	t	Defense Logistics Agency
DMP	=	Division of Management Policy
DPA	z	Delegation of Procurement Authority
DPCO	=	Department Protest Control Officer
DSDS	=	Director of Self-Determination Services
DTM	:5	Division of Telecommunications Management
DVA	=	Department of Veterans Affairs
EOB	=	Explanation of Benefits
FAR	=	Federal Acquisition Regulation
FDA	=	Food and Drug Administration
FI	E	Fiscal Intermediary
FIP	=	Federal Information Processing
FKRMR	s	Federal Information Resources Management Regulation

ACRONYMS USED IN THIS CHAPTER - CONTINUED

OIG	=	Office of Inspector General. Department of HHS
OIRM	=	Office of Information Resources Management
OMB	=	Office of Management and Budget
OS	=	Office of the Secretary
O T A	=	Office of Tribal Activities
PCO	=	Protest Control Officer
PDO	=	Purchase Delivery Order
PHS	=	Public Health Service
PHSAR	=	Public Health Service Acquisition Regulation
PL	=	Public Law
PMO	=	Property Management Office
PO	=	Project Officer
POR	=	Program of Requirements
P O R A	=	Principal Official Responsible for Acquisition
POUGA	=	Principal Official Responsible for Grant Awards
RFC	=	Request for Contract
RFP	=	Request for Proposal
RFQ	=	Request for Quotation
RTP	=	Request for Technical Proposals
RVU	=	Relative Value Unit
SADBUS	=	Small and Disadvantaged Business Utilization Specialist
SAMHSA	=	Substance Abuse and Mental Health Services Administration
SBA	=	Small Business Administration
SBTA	=	Small Business Technical Advisor
SCO	=	Senior Contracting Officer (Area Office)
SGM	=	Special General Memorandum
SOW	=	Statement of Work
SSA	=	Social Security Administration
SSC	=	Supply Service Center
TN	=	Transmittal Notice
UNICOR	=	Federal Prison Industries, Inc.
USC	=	United States Code

5-5.1 INTRODUCTION

- A. Purpose. This Chapter identifies; explains and clarifies Indian Health Service (IHS) policies and procedures for acquisition management.

These policies and procedures are based on specific Federal statutes and regulations, including the Federal Acquisition Regulation (FAR); the Health and Human Services Acquisition Regulation (HHSAR); the Public Health Service Acquisition Regulation (PHSAR), with reference also to other current applicable chapters in the Indian Health Manual (IHM); IHS Circulars; IHS Special General Memoranda (SGM); IHS Contract Policy Memoranda (CPM); and other IHS Memoranda, such as the Indian Self-Determination Memoranda (ISDM).

In FY 1994, the IHS was expected to outlay approximately \$1.6 to \$1.7 billion for all purposes. Of this total amount, approximately 55% to 60% (i.e., \$900 million to \$1 billion) was spent in the form of **direct expenditures**, approximately 40% to 45% (i.e., \$650 million to \$750 million) was expended through **contracts**, and under 5% (i.e., less than \$50 million) was outlayed in the form of **grants and agreements**.

- B. Background. The integrity of the IHS acquisition process must be maintained as a reflection of the IHS commitment to excellence in the management of its programs and fulfillment of its mission.

Reference is made to Executive Order 12352, Federal Procurement Reforms, signed by President Ronald Reagan on March 17, 1982. This Order requires each Executive Agency to:

"... Designate a Procurement Executive with agency-wide responsibility to oversee development of procurement systems, evaluate system performance in accordance with approved criteria, enhance career management of the procurement workforce, and certify to the agency head that procurement systems meet approved criteria."

Subsequently, each PHS agency was required to conduct a self-assessment of their acquisition function to ensure the acceptability of their procurement practices. The IHS system was certified by the Assistant Secretary for Management and Budget, Department of Health and Human Service (HHS)

Chapter 5
ACQUISITION MANAGEMENT

(5-5.1 (B) Continued)

in September 1987 as part of the Health Resources and Services Administration's procurement system.

In 1989, the requirements of Executive Order 12352 were reinforced by the Administrator for Federal Procurement Policy in a memorandum that requested procurement officials to review their systems, identify any poor or improper procurement practices, and correct deficiencies. In furtherance of this memorandum, HHS developed a list of systems and performance criteria to be used in conducting acquisition certification reviews of the various HHS contracting offices. These criteria are compiled in the HHS Procurement Review Guide which was issued in final form in June 1993. Beginning in 1989, the Division of Grants and Contracts, PHS began conducting reviews of a number of PHS contracting offices using the HHS Procurement Review Guide as the review protocol.

The Division of Contracts and Grants Policy (DCGP), IHS, has also adopted the contract file review checklists contained in the HHS Procurement Review Guide for use by the IHS Awarding Activities Offices and for use by DCGP in conducting review of contract files submitted to IHS Headquarters for pre-award reviews. The contents of these contract file checklists, as well as the factors relating to the efficient management of the procurement function contained in the HHS Procurement Review Guide, are reflected in this Manual Chapter.

- C. Policy. The Associate Director of the Office of Administration and Management (OAM) within IHS Associate Headquarters, the Directors of the IHS Area Offices and other Awarding Activities Offices and their respective functional managers for procurement are responsible for the uniform application and implementation of the Chapter 5 acquisition procedures.

Within the IHS, the term "Awarding Activities Offices" includes: (1) the eleven IHS Area Offices and the Office of Health Program Research and Development (OHPRD) in Tucson, Arizona; (2) the Offices of Engineering Services (OES) within the PHS Regional Offices for Regions II, VI, and X; (3) the IHS Headquarters West in Albuquerque, New Mexico; (4) the IHS Supply Service Center in Perry Point, Maryland.

(5-5.1 (C) Continued)

IHS functional managers for procurement at Headquarters are responsible for providing technical and such other assistance as may be required by Area Directors and their staffs.

- D . Revisions, Cancellations and Supplements. The Director, IHS, with the support and assistance of the Principal Official Responsible for Acquisition (PORA), has the authority to revise this Chapter, in whole or in part, consistent with Federal statutes and regulations.

Except when provisions in this Chapter explicitly indicate otherwise, the maintenance, administration, and operation of this IHM Chapter are to conform to the policy and procedural requirements established under the Indian Health Manual, Part 1, Chapter 1 - Indian Health Service Manual System.

Any change, update, revision, or cancellation of any policy or procedure formalized by this Chapter issuance, or its supplement, must be made utilizing a Transmittal Notice (TN) and follow established IHS/OAM Division of Policy Management review, distribution, and control processes.

Interim supplements to this Chapter, including various IHS numbered "memoranda" and circulars that originate at IHS Headquarters, may be issued and used to establish interim policies between periodic updates. This Chapter is to be revised as needed, but no less than every two years to incorporate such interim policy revisions. Such revisions are to be consistent with the requirements of the IHM, Part 1, Chapter 1.

Numbered memoranda and circulars are cancelled by a supersession line. To cancel a numbered issuance, an Errata Notice is issued using the same format as the item being cancelled, or a supersession line on a new issuance.

As necessary, the respective Area Offices may issue Area specific supplements to this Chapter, provided that such supplements are first approved by the PORA and the Associate Director, OAM.

- E. Preparation and Clearance of Revisions. The PORA is responsible for maintaining this Chapter in accordance with the IHS/OAM Division of Management Policy circular and memorandum system.

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ACQUISITION MANAGEMENT

(S-5. I (E) Continued1

Area specific supplements are to be sent by the respective Area Director to the PORA, and the Associate Director for Administration and Management, IHS Headquarters, for review, clearance, and coordination prior to implementation.

- F. Distribution and Control. The PORA is responsible for the timely issuance of this IHM Chapter, its revisions and its supplements.

A mailing list has been established by the IHS Directives and Delegations Control Officer to distribute this Chapter, and any subsequent revisions and/or supplements to all Headquarters, Area, and field activities that function as IHS Awarding Activities Offices.

- G. Sequential Development of Chapter 5. Part 5, Chapter 5 - Acquisition Management of the IHM consists of twenty substantive sections, plus a glossary and an index.

Because of the broad range of policy matters covered by Chapter 5, a brief outline and discussion of its content and sequence of sections follows,

The first four sections each discuss different introductory policies, procedures, and concepts involved in the IHS acquisition of supplies or services by contract or lease. These four sections are: "Section 1--Introduction," "Section 2--Status of Previous Policy Issuances (AOIs, CPLs, CPMs, and IHS Circulars)," "Section 3--Authorities and Responsibilities", and "Section 4--Ethics and Standards of Conduct."

"Section 5--Acquisition Planning" focuses on the various aspects and central importance of long-range, annual, and individual acquisition planning to the IHS procurement process.

"Section 6--Buy Indian Policy" outlines IHS policy towards the preferential use of Indian-owned businesses as vendors in the acquisition of IHS supplies and services.

"Section 7--Procurement-Contracts--General" is the essential section in Chapter 5 for obtaining a comprehensive overview of procurement contracting policies and procedures within the IHS. Section 7 focuses on how to contract for supplies and services for the IHS, and covers key contracting policies and procedures for IHS acquisitions that exceed the "small purchase limitation" (currently \$25,000 or less). IHS contract procurements at or under the small

(S-5.1 (G) Continued)

purchase limitation are discussed in detail under “Section 8 - Small Purchases,”

Subjects discussed under Section 7 include the basic elements necessary for any contract, explanation of the two major Federal acquisition methods--sealed bidding and negotiation, the use of different types of contracts, and special considerations in IHS contracting.

“Section 8--Small Purchases” examines the special policies and procedures that concern how to acquire supplies and services for the IHS when the total cost of the acquisition is at or under the small purchase limitation.

“Section 9--Contract Award Files--Structure, Content, Maintenance” focuses on the importance of documentation throughout the acquisition process and the importance of establishing and maintaining file records throughout the life of a contract.

Sections 10 through 13 each discuss a different IHS procurement contracting “special situation” that, in turn, requires certain special procedures depending on what is being purchased.

These four special situation sections include: “Section 10--Architectural and Engineering Contracting”; “Section 11 --Construction Contracting”; “Section 12--Automated Data Processing and Telecommunications Contracting”; and “Section 13--Acquisition of Health Case Services,”

“Section 14--Urban Projects - Contracts” concerns the policies that affect the IHS administered programs and contracts for health care services for American Indians and Alaskan Natives who live in urban areas, and who do not otherwise receive regular medical care through IHS facilities, or through Indian tribal Self-Determination contracts.

“Section 15--Unauthorized Commitments” discusses the recurring problem of unauthorized contractual commitments, including how to avoid this problem and how to “cure” it through the ratification process.

“Section 16--Contract Protests, Disputes, and Appeals” explains the procedures that the IHS follows when a contract protest, dispute, or appeal occurs, and ways to avoid such situations.

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(5-5.1 (G) Continued)

“Section 17--Post-Award Guidance” concerns IHS contract administration policies and procedures, from the award of an acquisition contract through final contract close-out.

“Section 18--Leasing Authority” focuses on IHS policies that govern leasing as an alternative to contract procurement.

“Section 19--Self-Determination Contracts” provides references to current IHS policies and procedures that govern the special contractual relationship between the IHS and Indian tribal governments when the contracting authority specified under Public Law 93-638, the Indian Self-Determination and Education Assistance Act of 1975, as amended, is used to provide services that would otherwise be operated directly by the IHS.

The references listed under this Section address special IHS responsibilities and procedures for Public Law 93-638 tribal contracts, since such 638 non-construction contracts are not subject to the FAR. Tribal construction contracts are subject to the FAR and Agency supplemental acquisition regulations unless waived by the Secretary of HHS.

“Section 20--Tribal Self-Governance Compacts” concerns the status of special IHS policies and procedures that govern contractual relationships with Indian tribes that receive Federal funding support under a tribal self-governance compact, as authorized under Public Law 100472.

“Section 21--Glossary” provides a brief definition for selected key terms used in this Chapter, while “Section 22--Index” provides a reference guide for finding topics discussed in this Chapter.

A list of acronyms used in this Chapter is included after the “Table of Contents.”

Chapter 5
ACQUISITION MANAGEMENT

5-5.2 STATUS OF PREVIOUS POLICY ISSUANCES

This Chapter of the IHM consolidates a broad range of IHS and other policy issuances that concern IHS acquisitions. As a policy consolidation vehicle, Chapter 5 -- Acquisition Management, supersedes the majority of these previously existing policy issuances as of September 30, 1994.

Manual Exhibit 5-5.2-A, which follows, provides a brief guide to the status of 74 such previous IHS policy issuances. Included in this summary are 43 HRSA and IHS AOIs, 4 HRSA CPLs, 19 IHS CPLs, 5 IHS CPMs, plus 1 draft CPM, and 2 IHS Circulars. For each of these policy issuances, Manual Exhibit 5-5.2-A provides: (1) the previous policy TN number; (2) the date issued; (3) the title or subject; (4) the status of each policy issuance as of the effective date of this IHM Chapter; and (5) a reference to where in this Chapter the previous policy subject matter can be found.

AUTHORITIES AND RESPONSIBILITIES

- A. Organizational Framework. The Indian Health Service (IHS) is one of nine operating components that constitute the U.S. Public Health Service (PHS).

The other eight PHS operating components are: the Agency for Health Care Policy and Research (AHCPR); the Agency for Toxic Substances and Disease Registry (ATSDR); the Centers for Disease Control and Prevention (CDC); the Food and Drug Administration (FDA); the Health Resources and Services Administration (HRSA); the National Institutes of Health (NIH); the Substance Abuse and Mental Health Services Administration (SAMHSA), and the Office of the Assistant Secretary for Health (OASH).

The PHS is one of the four major operating divisions under the Office of the Secretary (OS) of the Department of Health and Human Services (HHS). The other three major operating components are: the Administration for Children and Families (ACF); the Health Care Financing Administration (HCFA); and the Social Security Administration (SSA).

- B. Regulatory Framework. IHS acquisition policies and procedures are determined and governed by three distinct, yet interrelated levels of Federal regulations.

The Federal Acquisition Regulation (FAR) is the primary regulation used by all Federal Executive agencies in their acquisition of supplies and services with appropriated funds. The FAR is published in two volumes as Title 48-Chapter 1 of the Code of Federal Regulations (CFR). Volume 1 of the FAR contains parts 1 through 51, and Volume 2 contains parts 52 and 53. The FAR is issued within applicable laws under the joint authorities of the Administrator of the General Services Administration, the Secretary of Defense, and the Administrator of the National Aeronautics and Space Administration. FAR structure and content also is based on broad policy guidelines established by the Office of Management and Budget (OMB) within the Executive Office of the President.

The HHSAR establishes uniform acquisition policies and procedures for the HHS that conform to the FAR. The HHSAR implements and supplements the FAR. Implementing material expounds upon or indicates the manner of compliance with the related FAR material. Supplementing material is new material that is HHS unique in character, and that has no direct counterpart in the FAR.

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ACQUISITION MANAGEMENT

(5-5.3 (B) Continued)

The HHSAR contains all formal Departmental policies and procedures that govern the acquisition process or otherwise control contracting relationships between HHS's contracting offices and contractors.

The PHSAR similarly establishes uniform acquisition policies and procedures throughout the PHS, of which the IHS is a part. The PHSAR implements and supplements the HHSAR, but does not duplicate material published in either the HHSAR or the FAR.

In summary, the order of regulatory precedence is: the FAR, the HHSAR, and the PHSAR. Each successive regulation either implements or supplements a higher order regulation. When referring to acquisition regulations that govern the IHS, it is necessary to review the FAR, HHSAR, and PHSAR.

- C. IHS Policies and Procedures. IHS policy and procedural guidelines are provided by directives through the IHS Manual System. These directives are for IHS employees contracting for the IHS and the OES and are issued in the following authorized forms: Indian Health Manual (IHM) chapters and supplements; IHS circulars; IHS bulletins; and specialized IHS memoranda. IHS directives address a broad range of acquisition and related topics.

A more detailed description of the IHS directives system is provided in Section 1 of this Chapter, and a comprehensive discussion of the IHM is contained in Part 1, Chapter 1 - Indian Health Service Manual System.

In addition to the IHS directive system, the Division of Contracts and Grants Policy (DCGP) also provides policy and procedure guidance on contract acquisition issues through the use of CPMs.

- D. Head of the Contracting Activity. As a PHS Agency Head, the Director of the Indian Health Service is the designated Head of the Contracting Activity (HCA) for the IHS. The Director has delegated this authority to the Associate Director, Office of Administration and Management (OAM).

The HCA is responsible for conducting an effective and efficient acquisition program within the IHS. As prescribed in HHSAR 301.670-1, the HCA is to establish adequate controls that ensure compliance with applicable laws, regulations, procedures, and sound management practices.

/5-5.3 Continued)

E.. Principal Official Responsible for Acquisition. The Director of the Division of Contracts and Grants Policy, OAM, is designated as the Principal Official Responsible for Acquisition (POW) for the IHS. The PORA assists the HCA in carrying out the responsibilities associated with maintaining an efficient and effective acquisition program throughout the IHS. Subordinate to the HCA, the PORA is directly responsible for the day-to-day management and operation of overall IHS acquisition activities. As a result, the PORA provides both essential oversight and policy direction for IHS and other Awarding Activities Offices (HHSAR 302.1).

The responsibilities of the PORA within the IHS include:

- (1) issuing, as necessary, CPMs;
- (2) ensuring consistency within IHS in the application of acquisition regulations, policies and procedures;
- (3) identifying and resolving acquisition problems, conditions, or situations. that are specific to the IHS;
- (4) appointing IHS Contracting Officers, as prescribed by the HHSAR, and issuing Certificates of Appointment and Termination that specify limitations of authority;
- (5) maintaining this IHM chapter to ensure that it remains current through use of the IHS/OAM Division of Management Policy system of IHM supplements, circulars, bulletins, and special memoranda;
- (6) conducting oversight of IHS acquisition personnel to insure the integrity of the acquisition processes and procedures system;
- (7) ensuring that all proposed contract actions exceeding prescribed thresholds are reviewed and approved prior to award;
- (8) ensuring that all required reviews are conducted for Justifications for Other than Full and Open Competition (JOFOCs) and Advance Acquisition Plans;
- (9) ensuring that all unauthorized commitments are fully documented and are submitted for review and approval; and

Chapter 5
ACQUISITION MANAGEMENT

[S-5.3 (E) Continued]

(10) approval of use of Letter contracts, as required by HHSAR 316.603-3.

- F. Senior Contracting Officer. The Senior Contracting Officer (SCO) in each of the respective Awarding Activities Offices serves as the respective Chief of the Contracting Office (CCO). Each Awarding Activities Office has the authority to enter into acquisition contracts and other awards on behalf of the IHS.

Candidates for SCO are selected and appointed by the Awarding Activities Offices Director, subject to the formal approval of the PORA. The SCO is responsible for the day to day operation of acquisition activities at the Area, Service Unit, and Facility Levels, and for the direction and technical supervision of procurement staff employed at these locations.

The SCO is supervised by the Awarding Activities Office Director. The SCO also receives technical direction and oversight from the PORA for the proper administration of day-to-day acquisition functions. An SCO has the authority to redelegate his/her authority consistent with his/her own delegation.

- G; Area Directors. Each IHS Area Director is responsible for supporting the HCA, the PORri, and their respective SCOs to ensure that the integrity of the IHS acquisition system is maintained. This integrity is essential to the success of the IHS mission.

This responsibility includes knowledge of and adherence to the acquisition regulations in the FAR, HHSAR, and PHSAR, and to the IHS Manual System directives.

- H. Contracting Officers. Contract SPecialists. and Purchasing Agents. Properly trained acquisitions staff are essential in assisting program personnel in fulfilling IHS program requirements.

Each Area SCO is supported by an acquisition staff composed of Contracting Officers, Small Business Technical Advisors, contract specialists, purchasing agents, procurement analysts, cost/price analysts, procurement assistants, and clerical support staff. Workload is distributed to the acquisition staff by the SCO who must consider the complexity and dollar value of the acquisition, as well as the experience, training, HHS certification, and warrant level of the individual.

The Contracting Officer (CO) is the authorized IHS agent responsible for the overall management, direction, and enforcement of contract regulations for a particular contract or other acquisition activity. The CO also is responsible for organizing and coordinating the efforts of the various functional specialists and other support personnel who work on the contract.

(5-3.3 (H) Continued)

HHS certification is received through the HHS certification program for acquisition personnel. This program has varying, progressive requirements obtained through experience and classroom training for the four levels of certification (HHSAR 301.6). Certified staff are required to be familiar with the FAR, HHSAR, PHSAR, and IHS acquisitions policies and procedures in order to meet IHS performance objectives.

- I. Project Officers. Project Officers (POs) are a key operational link between IHS contractors and suppliers.

The PO usually identifies an individual acquisition requirement during the annual Acquisition Planning activity through a meeting, or series of meetings, with the contracting staff before submitting a requisition or request for contract. During this planning stage, the PO and the contracting staff informally discuss the procurement requirements (i.e., the nature of the purchase), and the best acquisition approach (i.e., how it should be purchased). The PO could also be the Senior Program Official and, as such, would be involved in the acquisition planning process.

In accordance with Section 5-Acquisition Planning, the PO is required to assist the acquisition staff in developing an Individual Acquisition Plan when such a plan is required. Based on decisions resulting from such consultation, the PO and CO jointly are to develop a schedule of events and timetable that will result in meeting the procurement need in accordance with applicable regulations.

Project Officer nominees are identified by appropriate, senior program officials, and are referred to the SCO for consideration. The PO is selected and appointed by the CO, based on qualifications, experience, and training. The PO serves as the CO's "eyes and ears" with regard to contractor performance. Nominations for appointment as a PO at each IHS organizational level - Facility, Service Unit, Area Office, or Headquarters - are to be made from among individuals who have experience and appropriate training, such as the successful completion of the HHS Project Officer course.

After contract award, the PO serves as the primary contract monitor for contractor performance on behalf of the CO. At this stage, the PO is responsible for tracking contract progress and for advising the CO, in writing, of contractor performance. Whether purchasing supplies or services through use of a procurement contract or a small purchase arrangement, a PO is responsible for technical oversight and knowledge of the details of the acquisition requirement, and for monitoring the

LS-3.3 (1) Continued]

delivery of acceptable contractor supplies or services according to contract terms and conditions.

The PO does not operate alone, but rather is a key member of the acquisition team. The PO must concentrate on the responsibilities assigned by the CO in writing commensurate with the complexity of a particular award.

- J. Small and Disadvantaged Business Utilization Specialist CSADBUSI. The Small and Disadvantaged Business Utilization Specialist (SADBUS) within IHS Headquarters is responsible for monitoring compliance with the various Federal socio-economic programs intended to promote the award of contracts to Indian economic enterprises, small business concerns, and small disadvantaged businesses, including minority-owned businesses, women-owned businesses, and businesses in labor surplus areas.

Some of these so&-economic programs are authorized under the terms of the Small Business Act of 1958, (Public Law 85-536). as amended, and are centrally directed and coordinated by the Small Business Administration (SBA). Other such programs are established by Executive Order of the President, and by other Federal statutes including the Buy Indian Act (25 U.S.C. 47).

The IHS SADBUS recommends policies to the IHS Director and the PORA that will achieve the Federal goals and objectives of this Small Business Act program within the context of IHS procurement needs. In addition, the IHS SADBUS coordinates activities and advises the Small Business Technical Advisors (SBTAs) who are located within each IHS Awarding Activities Office.

General provisions concerning the Office of Small and Disadvantaged Business Utilization are contained under the FAR 19.201 through 19.202-6. Specific duties of the SADBUS within the HHS are described and outlined under HHSAR 319.201-70.

- K. Funds Certification Officer. A Request for Contract (RFC) or the Requisition (SF-373) must be submitted to the certifying official to obtain the proper certification that funds are available to pay the costs of the proposed acquisition. The certifying official is either the Finance Officer or other individual designated as a certifying official for the respective IHS Facility, Service Unit, Area, or Headquarters organizational component that has proposed the acquisition. Each Awarding Activities Office shall maintain a list of all persons for offices under their purview who have been designated as certifying officials. In no event, however, may a certifying official also be the individual initiating or approving the requirement.

/II-3.3 (K) Continued)

The certification is completed when the Finance Officer, or other certifying official, signs the Requisition Form 393 or the RFC. This certification indicates that adequate funds to pay for the acquisition are available, and are reserved in the accounting records of the IHS Awarding Activities Office; or are currently unavailable, but will be made available upon receipt of appropriations.

5-5.4 ETHICS AND STANDARDS OF CONDUCT.

- A. Overview. As an Agency of the United States Federal Government, the IHS is governed by the specific standards of conduct that are found in various Federal laws and regulations.

Many of these "basic" standards of conduct concern all IHS personnel, while others impose additional responsibilities on those individuals who hold positions or powers involving special or sensitive areas of trust or responsibility. Thus, all IHS personnel share a number of "common" ethical responsibilities in the conduct of their Federal service. Such common ethical responsibilities include those to the American people and taxpayers; to the American Indian and Alaska Native children and adults who are the beneficiaries of IHS services; to IHS vendors, contractors, and others who deal with the IHS; and to other IHS personnel.

For all IHS personnel involved in procurement and other extramural award and agreement activities, special, additional ethical responsibilities are imposed. These "extra" ethical responsibilities, imposed on all involved in the IHS acquisition, grant, and agreement processes, stem from the necessity to always conduct the business of the American people in a manner that is above reproach.

To summarize, ethics within the IHS cover everything from standards of conduct imposed by statute and regulation to those imposed by custom and common sense.

- B. Standards of Conduct. Basic standards of conduct for the acquisition process are found in Part 3 of the FAR. Standards of conduct for employees of HHS are found in 45 CFR Part 73 and in Personnel Pamphlet Series No. 7. In addition, the U.S. Government Printing Office publishes and sells the August 1992 document, Standards of Ethical Conduct for Employees of the Executive Branch, which includes Executive Order 12674 of April 12, 1989, "Principles of Ethical Conduct for Government Officers and Employees" and the Final Rule of August 7, 1992, "Standards of Ethical Conduct for Employees of the Executive Branch," (5 CFR Part 2635), as published in the Federal Register of August 7, 1992 (pp. 35006-35067).

The regulations are designed to ensure that Government business is conducted effectively, objectively, and without improper influence or the appearance of improper influence. As stated in FAR 3.101-1:

"Transactions relating to the expenditure of public funds require the highest degree of public trust and an impeccable standard of conduct. The general rule is to avoid strictly any conflict of interest, or even the appearance of a conflict of interest in Government-contractor relationships."

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(5-5.4 Continued)

C. Conflict of Interest. Conflicts of interest fall under two broad categories, “actual” and “apparent.” Actual conflicts of interest include the following:

- (1) Engaging in a private business or professional activity where there would be a conflict between official duties and one’s private interests.
- (2) Having a financial interest, either directly or indirectly, where there would be a conflict between official duties and the financial interest. This includes the employee, the employee’s spouse, the employee’s children, any organization in which the employee serves as an officer, or an organization with which the employee may be negotiating or has an arrangement for prospective employment.
- (3) Using, or giving the appearance of using, inside information to further a private interest of oneself or another person with whom one has family, business or financial ties. Inside information is information available to the Government but not available to the public.
- (4) Using one’s official position to get a financial benefit for oneself or another person. Exercise care if you have a family, business, or financial connection with potential contracts with your agency.
- (5) Acting as an agent in a claim against the United States. This would include a claim before any Department, Court, or agency in which the United States is a party or has a direct and substantial interest. Public Law 93-638 permits former IHS employees to serve as an agent for an Indian tribe. The Secretary must be advised in these cases.

Compared to actual conflicts of interest, apparent conflicts of interest are much more difficult to define **or** to prove. To the general public, however, apparent conflicts are often more visible and, therefore, more difficult to disprove to the layman. Since there is no clear definition, each employee should think about their actions and how their actions might be viewed by the public, and should guard against doing anything that might appear to give one person, group, or business an advantage over another. Employees should also be especially careful if it might appear that the beneficiary is a friend or relative.

D. Gratuities. FAR 3.101-2 states in part:

“As a rule, no Government employee may solicit or accept, directly or indirectly, any gift, favor, entertainment, loan, or anything of monetary value from anyone who (a)

(5-5.4 (D) Continued)

has or is seeking to obtain Government business with the employee's agency, (b) conducts activities that are regulated by the employee's agency, or (c) has interests that may be substantially affected by the performance or nonperformance of the employee's official duties. Certain limited exceptions may be authorized in agency regulations. "

The definition of "gratuity" has been subject to different interpretations over the years. There is no question that asking for or accepting money or presents would be considered gratuities. However, food, drink, and transportation present another set of problems. Currently, food, drink, and transportation are considered gratuities except in the following situations:

- (1) Food and drink served at luncheons, dinners, and similar gatherings sponsored by an industrial, technical, or professional association are permitted if there are discussions of matters of mutual interest to Government and industry. The sponsor must be an association, not a contractor.
- (2) Customary social exchanges between personal friends and relatives are permitted if the exchange is on a personal basis. However, care should be exercised if the "personal" friend is a contractor who has a contract with the Agency. That could give the appearance of a conflict of interest. This is an area where common sense must be used.
- (3) Things available to the public at a trade show or exhibition.
- (4) Participation in a community activity where the relationship with the contractor is remote, though the activity might be sponsored by the contractor.
- (5) Local transportation provided by the contractor while on official business may be accepted when alternate arrangements are not practical. However, this should be restricted to working hours.

FAR 3.2 requires, the clause at FAR 52.203-3 -- Gratuities, be included in solicitations and contracts, except those for personal services. Agency personnel must report any suspected violations of the clause to the CO or other designated official.

HHS reporting procedures are found in HHSAR 303.203. These regulations require suspected violations of the clause to be reported under Subpart M, Reporting

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(5-5.4 (D) Continued)

Violations, of the Department's Standards of Conduct (45 CFR 73) and General Administration Manual, Chapters 5-10.

- E. Anti-Trust Violations. Contracting personnel must be alert to contractor practices that may be against Federal law or in violation of Federal regulations. FAR 3.3 requires contracting personnel to report these practices to the Attorney General and the Agency official responsible for taking termination or debarment actions.

HHSAR 303.3 requires that a copy of each suspected antitrust violation report be sent to the Attorney General and to the Director, Office of Acquisition and Grants Management, HHS. The PORA should be notified immediately. Agency reports to the Department of Justice shall be sent to:

Attorney General,
U.S. Department of Justice
Washington, D.C. 20530
Attn: Assistant Attorney General, Antitrust

The report shall have a brief statement describing the suspected practice, the reason for the suspicion, and the name address and telephone number of the agency contact.

Possible unlawful actions include:

- (1) Identical bids on the same line items;
- (2) Rotating low bids;
- (3) Collusive price estimating systems; and
- (4) Sharing of business.

The fact that identical bids are received may not be due to an unlawful action. It may simply be that a subcontractor quoted a price to more than one bidder. FAR 3.303(c) explains the practices that may show there is a violation of the law.

- F. Procurement Integrity. In 1989, the Congress enacted new legal restrictions on Federal procurement officials and their counterparts in the private sector in response to a Pentagon investigation of military procurement problems code-named "Operation Ill-Wind." These new restrictions came in the form of an amendment to the Office of

f5-5.4 (F) Continued)

Federal Procurement Policy Act (OFPPA: Public Law 93-400, as amended). Specifically, Section 814 of Public Law 101-189, the National Defense Authorization Act for Fiscal Years 1990 and 1991 (November 19, 1989) amended Section 27 of the OFPPA in order to strengthen and clarify various Federal procurement policies and procedures.

The Public Law 101489 Amendment (the 1989 Amendment) prohibits Government procurement officials and competing contractors from:

- (1) Soliciting, disclosing, or obtaining protected procurement related information;
- (2) Offering, giving, demanding, or receiving any money, gratuity, or other thing of value; or
- (3) Soliciting, offering, accepting future employment, or a business opportunity.

Regulations to carry out the 1989 Amendment to the OFPPA are found at **FAR 3.104** and HHSAR 303.104.

Definitions critical to understanding the law and its regulations are found at FAR 3.1044 and HHSAR 303.104-k These definitions include, but are not limited to, the following:

- (1) “Procurement official means any individual who has participated personally and substantially in the conduct of the procurement.” See HHSAR 303.104-4(h)(1) for a comprehensive listing of the classes of employees that HHS considers prospective “procurement officials” based on their participation in the conduct of a procurement. The CO has the responsibility to decide who is a procurement official in a particular case. The CO is responsible for consulting with the Office of the General Counsel if the situation is “particularly complex or sensitive.” In those cases where a person designated as a procurement official disputes the designation, the PORA will make a final decision. Any individual who serves as a procurement official shall be required to execute the one-time integrity certificate.
- (2) “Participate personally and substantially” means active and significant involvement by the individual in activities directly related to the procurement.

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(5-5.4 (F) Continued)

- (3) “Source selection information” includes documents that refer to, directly cite, or paraphrase proprietary or source selection information. See HHSAR 303.104-4(k)(1).
- (4) “Competing contractor” with respect to any procurement . . . means ‘any entity that is, or is reasonably likely to become a competitor for or recipient of a contract or subcontract under such procurement, and includes any other person acting on behalf of such an entity’. See FAR 3.104-4(a)(1) and (2).
- (5) “During the conduct of any Federal agency procurement of property or services” means the period beginning with the development, preparation, and **issuance** of a procurement solicitation, and concluding with the award, modification, or extension of a contract, and includes the evaluation of bids, proposals, selection of sources, and conduct of negotiations. See FAR 3.104-4(c)(1) and (2).
- (6) A contract modification over \$100,000 is a separate action for the purposes of procurement integrity certification.

The following prohibitions apply during a procurement:

- (1) There can be no offers of gratuities to procurement officials.
 - (2) There can be no attempts to obtain unauthorized access to procurement information protected by the OFPPA, i.e., Government source selection information, contractor proprietary data, or information.
 - (3) A competing contractor may not knowingly discuss, make an offer, or promise future employment or a business opportunity to a procurement official. A procurement official may not accept or ask for any of these things.
 - (4) A competing contractor may not knowingly offer any money, gratuity, or other thing of value to a procurement official. A procurement official may not accept or ask for any of these things.
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(5-5.4 (F) Continued) ,

- (5) A contractor may not knowingly seek or obtain proprietary information submitted by a competing contractor. A contractor may not seek or obtain the source selection information created by the procurement officials. There is, also, a prohibition placed on procurement officials. HHSAR 301.104-5(d) lists those persons who may have access to source selection information. It requires the CO to include in the contract file the names and functions of any other individuals authorized access to proprietary or source selection information. Also see HHSAR 301.104-5(c) as to the COs authority to authorize access to proprietary or source selection information.

Certain certifications are required under the OFPPA when the contract or contract modification, individually or collectively, exceeds \$100,000. FAR 3.104-9(b) requires certifications by competing contractors.

- (1) They must certify that, to the best of knowledge and belief, they have no information about any actual or possible violation of the OFPPA, either by a competing contractor or by a procurement official, and if they have such information, they must disclose it and certify that all information has been disclosed.
- (2) They must affirm that all officers, employees, agents, etc., who participated personally and substantially in the procurement, have certified that they are familiar with conduct prohibited by the Act and will report any violations to them.

When sealed bidding is used, the bid shall be rejected as nonresponsive if the certifications are not included with the bid and properly executed. When negotiated acquisition is used, the successful offeror must submit the certifications in the time specified by the CO. This must be done before the contract award.

For contracts and contract modifications, that individually or collectively, exceed \$100,000, the CO is also required to make a procurement integrity certification prior to award of the contract or modification. The CO must (1) certify that, to the best of his/her knowledge and belief, he/she has no information concerning a violation or possible violation of the Act, as implemented by the FAR, or (2) disclose any such information and certify in writing that all such information has been disclosed.

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(5-5.4 (F) Continued)

HHSAR 303.104-6 requires all procurement officials leaving IHS to complete the certification found in Chapter I-90 of the General Administration Manual. If an official leaves while conducting a procurement expected to result in a contract or contract modification, that individually or collectively exceeds \$100,000 the Administrative Officer must send a copy of the certification to the CO to be included in the contract file.

The SCO shall be responsible for insuring that proper procurement integrity certification files/records are maintained.. For processing violations or possible violations of procurement integrity, refer to HHSAR 303,104-1 1 for guidance.

- G. Lobbying. Section 319 of the Department of the Interior and Related Agencies Appropriations Act, Public Law 101-21, added a new section 1342 to Title 31 U.S.C. entitled "Limitation on Use of Appropriated Funds to Influence Certain Federal Contracting and Financial Transactions."

Section 1342 prohibits recipients of Federal contracts, grants, loans, or cooperative agreements from using appropriated funds for lobbying the executive or legislative branches of Government in connection with specific contract, grant, loan, or cooperative agreements. It requires persons requesting or receiving a Federal contract, grant, or cooperative agreement over \$100,000, or a loan over \$150,000 to disclose lobbying with other than appropriated funds.

Under FAR 3.801, Indian tribes, tribal organizations, or other Indian organizations are excluded from the definition of "person" with respect to "expenditures specifically permitted by other Federal law." Therefore, contracts entered into under P.L. 93-638 are not exempt from the requirements of 31 U.S.C. 1342. FAR 3.8 cites the appropriate provision and clause to carry out the requirements.

The CO is responsible for including the provision and the clause in all solicitations and shall also obtain the certifications and disclosures required by this provision and clause. Copies of all contractor disclosures shall be sent to the responsible IHS official for action. The original disclosure shall remain in the contract file.

5-5.5 ACQUISITION PLANNING

- A. Overview of the Acquisition Planning Process. Both the FAR at Subpart 7.1 and the HHSAR at Subpart 307.1 require that advanced procurement planning be accomplished on an annual and individual **basis**.

Acquisition planning within the IHS ideally occurs along a time line that begins with long-range planning that is intended to promote competition in contracting. Such planning is then projected for implementation in any current fiscal year according to a comprehensive Annual Acquisition Plan, and finally uses a well-designed individual Acquisition Planning Document (APD) as an important tool for the actual procurement of supplies and services in a timely, cost-effective, proper, and well-documented manner.

A comprehensive understanding of past patterns in IHS procurement requirements is one characteristic mark of the IHS acquisition planning process. Equally important, however, is a second characteristic mark: a flexible responsiveness to unexpected human medical need.

To be truly effective, IHS acquisition planning also must be flexible enough to anticipate and to accommodate dynamic and changing health care needs and conditions that are inevitable when the mission of the Agency is to provide responsive, quality health care services to the American Indian and Alaska Native population.

Responsibility for feasible, effective acquisition planning rests with IHS managers and administrative personnel at each IHS organizational level.

The Acquisition Planning process within the IHS absolutely requires cooperation and coordination among the PO, the CO, Program Personnel, and Area or Headquarters Reviewers if contract and program requirements are to be met in a timely, efficient and cost-effective manner that contributes to the overall IHS Agency mission to provide the highest quality health care to American Indian and Alaska Native recipients.

Responsible personnel at individual IHS facilities, service units, Area offices and Headquarters all need to know and to apply the three basic steps in the acquisition planning process: (1) identifying a need, (2) scheduling acquisition work, and (3) developing an individual acquisition plan.

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{S-5.5 (A) Continued}

- (1) Step 1 -- Identifying a Need. The acquisition planning activity, in its truest sense, begins at any time that IHS Agency personnel first identify and begin to justify a need to procure supplies or services.

In some cases, such as the need for construction or expansion of a health care facility that responds to a steady increase in the service population, the acquisition “need” may emerge over the course of several years or even decades.

In other cases, such as an emergency requirement for large quantities of pharmaceuticals to treat an epidemic disease, the acquisition “need” may become apparent with only a few days or weeks notice.

Many IHS acquisition needs reoccur annually with a fair degree of regularity, while others may clearly emerge as new requirements well before the beginning of a new fiscal year.

In all of these cases, long-range acquisition planning should begin no later than the formulation and submission of the annual IHS budget, a process that starts approximately eighteen months before the beginning of the fiscal year in which the supplies and services will be procured.

Critically important to all IHS acquisition planning, whether long-range or short-term, is the responsible action of IHS program and contract personnel who identify and justify an acquisition need. It is through such identification, justification, and estimation of cost that the need can be included within the annual IHS budget to the Congress, can be scheduled under the Annual Acquisition Plan, and can be met during the course of a fiscal year through the use of individual acquisition planning.

As summarized in the FAR: “Acquisition begins at the point when agency needs are established and includes the description of requirements to satisfy agency needs . . .” [FAR 2.1011.

- (2) Step 2 -- Scheduling Work. The funding amounts and conditions in the annual Congressional appropriation for the various activities of the IHS, including procurement, determine the actual dollars that will be available in any fiscal year for the acquisition of supplies and services.

/5-5.5 (A) Continued)

Once a Congressional appropriation for any fiscal year, and its rate of apportionment by the Office of Management and Budget (OMB) are known, the IHS Annual Acquisition Plan becomes the primary tool to assist IHS program managers in the coordination and scheduling over the course of the fiscal year of various contractual requirements involving program offices and contract offices.

Development of the Annual Acquisition Plan is thus the second critical step in IHS acquisition planning. The next subsection examines the intent, scope and content of the Annual Acquisition Plan in greater detail. In essence, the purpose of proper scheduling within the IHS is ideally to spread out and control the annual acquisition workload throughout the fiscal year, while also remaining cognizant of the fact that not more than 30% of the Agency's total acquisition appropriation may be obligated in the fourth quarter of any fiscal year.

Such annual planning also allows-- (1) for a more effective implementation of the requirements of the Buy Indian Act to use Indian-owned business entities as vendors wherever possible; and (2) for the identification of contract opportunities for other small and minority-owned businesses by the Office of Small and Disadvantaged Business Utilization.

By employing an effective Annual Scheduling process, the following can be avoided, or at least minimized: (1) hasty, "crisis" driven acquisition decisions; (2) untimely, late procurements that result when personnel are overloaded with priority acquisition work; and (3) the wastefulness and inefficiency that too often characterize "last minute" year-end spending.

- (3) Step 3 -- Developing an Individual Acquisition Planning Document. The individual Acquisition Planning Document (APD) is the first basic planning tool used to initiate the actual procurement of needed specific supplies or services for the IHS.

The individual APD identifies the particular IHS procurement need, the funding source, the probable mode of procurement, and potential vendors capable of meeting the specific requirements of the acquisition, and a number of other important, variable factors.

(5-S .5 (A) Continued)

Once a particular procurement need is clearly identified, the individual APD should be developed as early as is reasonably possible. It is the effective tie of this third step in the planning process that often has the greatest impact on whether or not a specific acquisition action achieves its goals, especially when the factors of product or service value, price, and timeliness are considered.

Subsection C provides more policy direction for the development and use of the individual APD.

- B. Annual Acquisition Plan. IHS Awarding Activities Offices must carefully plan their spending and seek to distribute their acquisition workload throughout the entire fiscal year, and adhere to the fourth quarter spending limitation imposed on the IHS.

hnUd acquisition planning helps to balance the procurement workload and avoids awarding too many contracts at the end of the fiscal year: a spending practice that has too often in the past proved wasteful to Federal agencies, and which, as a result, is the subject of close scrutiny from both the Congress and the OMB.

- (1) Federal Regulations. Federal regulations under Part 7 of the FAR concern acquisition planning in general, and should be read both as background for the development of the Annual Acquisition Plan, and, in particular, as a guide when preparing individual APDs.

Specific regulations regarding ~~AMUZ~~ Acquisition Planning {Scheduling} for Agencies within the HHS are found in the HHSAR under Subpart 307.71. These regulations require operating and staff divisions to coordinate their acquisition actions over an eighteen month period.

Although the divisions and offices within HHS have flexibility to schedule individual contract actions, the "touchstone" for these regulations is that the annual acquisition workload should be distributed as evenly as possible throughout the fiscal year, taking into account the limitation that is imposed on fourth quarter IHS spending.

- (2) Senior CO Resnonsibilities. Preparation and maintenance of the Annual Acquisition Plan is the responsibility of the SCO within each IHS Area contracting office, and the Offices of Engineering Services (Regions II, VI and X).

(5-5.5 (B) Continued]

No later than the first month of each fiscal year, the SC0 is to request identification of all requirements that are expected to result in a formal contract award (usually above \$25,000). This identification is to be made for each program that is supported by the contracting office.

At a minimum, this identification is to include the title of the projected requirement, total estimated costs to be obligated, the date the RFC is expected, and the target award date.

The Annual Acquisition Plan that is to be developed using this information is to include all new contract requirements for the fiscal year, including anticipated Public Law 93-638 awards, and all modifications over the small purchase limitation to on-going contracts.

In developing the Annual Acquisition Plan, the SC0 allows 30 days for the program to identify acquisition requirements. As projected requirements are received, the SC0 consolidates this information into a single report, which is then maintained, updated and distributed as required to meet Agency goals. As unforeseen, unplanned RPCs are generated during the course of the fiscal year, the SC0 is further responsible for revising the annual plan accordingly.

Each quarter of the fiscal year, the SC0 is to distribute the most up-to-date version of the Annual Acquisition Plan to responsible program managers for their review. At this time, the program office is to note a brief update on the status of the procurement requirement, and then to return the annotated Plan to the contracting office.

Upon receipt of such annotated Plan each quarter, the SC0 is to review all additions and deletions--paying special attention to the identification of new requirements, to the realism of projected RPC and award dates, to the identification and resolution of problems, and to making required assignments to contract personnel.

Throughout the course of the fiscal year, the SC0 is required to advise program personnel of their need--

--to ensure that new contracts follow pre-established plans; and,

--to minimize year-end spending.

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(5-5.5 (B) Continued!

The SCO is also responsible for setting closing dates for the receipt of new RFC purchases from current fiscal year funds, and for expediting the preparation and processing of actions that require higher levels of approval in order that all awards may be made in a timely manner.

- (3) Project Officer Responsibilities. The PO provides primary assistance to the SCO in the development of the Annual Acquisition Plan, and is also central to the development of required Individual Acquisition Plans.

In effect, the PO takes the lead in doing the basic work that leads to development of both the annual and individual plans. With respect to the Annual Acquisition Plan, the PO's responsibilities include preparation of the RFC, advising the SCO of the expected RFC submission date, and informing the SCO responsible for the quarterly update of any expected changes in the RFC or related deadlines.

When used effectively, the Annual Acquisition Plan for each IHS Area becomes an excellent tool for facilitating communication and cooperation between contract specialists and programmatic functional managers. The result is not only more efficient and more cost-effective achievement of IHS program goals, but also, and ultimately, the enhanced delivery of timely, quality health care to thousands of individual American Indian and Alaska Native children and adults.

- C. Individual Acquisition Planning Document. The Individual Acquisition Plan is an effective administrative tool that helps both the CO and the PO address the necessary requirements and timeliness to complete a particular IHS acquisition activity.

Within the HHS, the Individual Acquisition Plan is actually accomplished through use of an instrument termed the "Acquisition Planning Document" (APD).

The APD serves as an advance agreement between Agency program and contracting personnel, outlining the methods of how and when an acquisition is to be accomplished.

Primary purposes of the APD include promoting competition as well as identifying and resolving problems early in the acquisition cycle, thereby precluding delays in contract placement and performance. In general, the APD is developed prior to the preparation and submission of the formal RFC.

15-5.5 (C) Continued

1. Federal Regulations. In preparing APDs, the CO and the PO are to adhere to the requirements and guidance provided under Part 7 of the FAR, and Subpart 307.1 of the HHSAR.

Although the HHS does not prescribe a standard format for the APD, the HHSAR under Subpart 307.105-1 describes key elements that must be addressed in each Agency's APD, while Subpart 307.105-2 describes special program clearances and approvals. HHSAR 307.104-1 gives the PORA authority to prescribe additional acquisition planning procedures.

Within the IHS, APDs are required for the following types of acquisitions:

- a. Negotiated acquisitions over the small purchase limitation.
- b. All Two-step sealed bid acquisitions expected to exceed the small purchase limitation.
- c. All Sealed bid acquisitions, regardless of dollar value.
- d. Construction services of any amount, including any construction under the self-determination authority of Public Law 93-638.

APD's are NOT required for the following types of acquisition contracts:

- a. Architectural and Engineering services.
- b. Utility services available from only one source.
- c. Acquisitions made from or through other Government agencies.
- d. Negotiated, non-procurement, non-construction acquisitions made pursuant to P.L. 93-638.
- e. Contract modifications that either exercise an option or add funds to an incrementally funded contract, provided an approved APD is in place and there is no significant deviation from this plan.

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(5-5.5 (C) Continued)

Exhibit 5-5.5-A prescribes the acquisition plan format that is to be used for all acquisitions. (Additional lines may be added to this format, when necessary, and milestones may also be added to the acquisition planning schedule, if required.)

- (2) Responsibility for the APD. Within the IHS, preparation of the APD is the joint responsibility of the CO and the PO, but also may include such other IHS personnel as the PORA may prescribe.

In actual practice, the PO often assumes a lead role in developing an APD, while coordinating such development with the CO. Project Officer responsibilities also include finalizing the Statement of Work (SOW); preliminary development of the RPC, including required cost-estimates and delivery requirements; requesting the necessary funds; suggesting vendor sources; determining criteria for evaluation; obtaining required clearances; and submitting the completed RPC to the Contract Office.

CO responsibilities for an APD include discussion of work requirements with the PO; preliminary review of the developing RPC for scope and clarity; development of a contract schedule that will meet the required award deadline; determining the type of contract that is most appropriate based on the specifications or SOW; and the assignment of any required contract specialists to assist the PO.

Effective with the publication of this IHM Chapter, the CO is required to notify the PO of expiring contracts 180 days prior to the date of expiration, and to request that the PO initiate any appropriate planning documents that may be required for renewal. Notwithstanding this notification, the PO remains responsible for actually initiating the renewal APD and RFC.

Management personnel within the appropriate IHS Headquarters or Awarding Office have the responsibility to assist the CO and PO with the development of the project concept; to assist in coordination with other Program and Tribal Officials when necessary; to aid in the development of the APD and RPC specifications and definition of the scope of work; to help determine the availability of funds as well as the optimum time of contract award; to initiate review and approval of any special requirements (such as those for procurement of Automatic Data Processing or Telecommunications equipment) and to participate in the recommendation of a PO.

(5-5.5 CC) Continued)

Depending on the nature and dollar value of the contract, final review responsibility for the APD will occur either at the Awarding Office or Headquarters level. The reviewer's responsibilities include APD approval, disapproval, or clarification, if necessary; assurance that necessary clearance requirements are initiated; assurance that final approval or disapproval by the

PO was obtained; and verification that the APD is in compliance with Headquarters overall acquisition plans.

(3) Approval of the APD.

Within the IHS, the appropriate signature level of the Approving Official depends on the total cost of the acquisition as follows: (a) planning documents for contracts between \$25,000 and \$1,000,000 are to be approved by the CO; (b) planning documents for contracts over \$1,000,000 are to be approved by the PORA, or someone who is designated by the PORA, provided that such designee is in a position no lower than the next level above the responsible CO.

- D. Summary. IHS acquisition of supplies and services, and the IHS acquisition planning that facilitates orderly, timely, and cost-effective procurement, is a team effort requiring the combined efforts, cooperation and coordination of all involved contract, program and review personnel.

A summary chart that outlines the various steps in the IHS acquisition process follows under Exhibit 5-5.5-B.

5-5.6

BUY INDIAN POLICY

- A. **Overview.** This section addresses IHS policy regarding the procurement of supplies and services under the authority of Section 23 of the Act of June 25, 1910, Public Law 61-313 (25 U.S.C. 47), commonly referred to as the “Buy Indian Act.”

Federal regulations governing IHS use of the Buy Indian Act are under the PHSAR, Subpart 380.5 -- Acquisitions under the Buy Indian Act.

The Buy Indian Act under 25 U.S.C. 47 provides that:

“So far as may be practicable, Indian labor shall be employed, and purchases of the products of Indian industry may be made in open market at the discretion of the Secretary of the Interior.”

The Buy Indian Act is not an authority to contract. Rather, the Buy Indian Act provides the authority to negotiate with Indian entities to the exclusion of non-Indian entities. The authority is discretionary. The Secretary of HHS does not have to use it. However, as noted in Subsection B, which follows, it is the policy of the IHS to utilize this negotiation authority to the maximum extent possible.

The purpose of Buy Indian set-asides is to award certain acquisitions exclusively to Indian-owned economic enterprises. The determination to use a Buy Indian set-aside is a unilateral determination made by the CO; however, in making this determination, the CO should consider the recommendations of program officials, and the IHS SADBUS and SBTA. Buy Indian set-asides may be conducted by using Sealed bidding (see FAR Part 14) or competitive proposals (see FAR Part 15).

Authority for the Indian Health Service to use the Act was transferred to the Surgeon General of the Public Health Service by the Act of August 5, 1954; and later to the Secretary of Health, Education, and Welfare, effective June 25, 1966, under Reorganization Plan No. 3 of 1966. (See PHSAR 380.501(b) for a more detailed narrative of the delegations of authority to use the Act.)

- B. **IHS Policy.** The current policy of the Indian Health Service is to use the authority provided by the Buy Indian Act whenever it is practical to do so. (See PHSAR 380.501(a).) It is also current IHS policy to negotiate only with Indian firms that are 100 percent Indian-owned and that remain 100 percent Indian-owned during the life of the contract.

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[5-5.6 (B) Continued]

Failure of a firm to remain 100% Indian-owned during the life of the contract is a breach of contract and may result in termination for default. Before taking such action, however, the CO must determine the reason for the change in ownership and prepare a written finding and determination. The CO also shall consult with the PORA before terminating the contract.

Deviation from the 100 percent requirement may be approved on a case-by-case basis by the cognizant Awarding Office Director. The need for a deviation must be justified and the percentage of Indian ownership cannot be reduced to less than 51% .

Joint ventures are permitted for specific projects. In such cases, the Indian firm must be the managing partner and must be approved as such by the CO before the contract is awarded.

It is also IHS policy that there be Indian preference in employment, training, and subcontracting. (See Section 7(b) of Public Law 93-638 and PHSAR 352.270-2 and 352.270-3.)

- C. Competition. The Buy Indian Act does not eliminate the need to obtain competition. It only authorizes the Indian Health Service to restrict the competition to qualified Indian firms. Therefore, competition among Indian firms is required unless a Justification for Other than Full and Open Competition (JOFOC) is prepared in accordance with HHSAR 315.7105.

Requirements of a Buy Indian acquisition must be published in the "Commerce Business Daily" (CBD) and the synopsis must state that the acquisition is restricted to qualified Indian firms.

- D. Determination of Responsibility. Before a contract can be awarded under the Buy Indian Act, the CO must determine that satisfactory performance is likely. This determination must be in writing, must be made prior to the award of the contract, and consider the standards set forth in FAR 9.104, HHSAR 309.104, and PHSAR 380.502-2.
- E. Use of Non-Indian Firms. Contracting with non-Indian firms is authorized only in those instances where use of the Buy Indian Act would conflict with FAR, Part 8 (Required Sources of Supply and Services) or where the contracting office cannot find a qualified Indian firm after a reasonable attempt has been made. Publishing a synopsis in the CBD constitutes a reasonable

(S-5.6 (E) Continued)

attempt to locate qualified Indian firms, and the lack of a satisfactory response to the publication justifies contracting with non-Indian firms.

Documentation of the non-availability of Indian firms and the steps taken to locate them must be included in the contract file. Likewise, if the requirements of FAR, Part 8 supersede the Buy Indian Act, the file must also have a statement that use of the non-Indian firm was required.

- F. Construction. Construction contracts, as with all other contracts entered into under the Buy Indian Act, are subject to the FAR and HHSAR requirements. Accordingly, FAR, Part 22 (Application of Labor Laws to Government Acquisitions) and FAR, Part 36 (Construction and Architect-Engineer Contracts) are of particular significance, as is PHSAR, Part 336 (Construction and Architect-Engineer Contracts).

Section 11 of this Chapter provides a detailed discussion of construction contracting.

As of the date of this Chapter 5 draft, the priority for the use of Buy Indian businesses, the percentage of required Indian ownership, and related matters, are under review by the IHS,

5-5.7 PROCUREMENT CONTRACTS--GENERAL.

- A. Overview. Procurement contracting is the principal way that the IHS acquires the supplies and services it needs to meet its objectives and perform its mission.

IHS procurement contracting procedures can be used to acquire supplies and services that range from under a dollar to millions of dollars in value. In practice, however, IHS and other Federal Agency acquisition of supplies and certain services that are under the “small purchase limitation” (currently \$25,000 or less in value) use special “small purchase” procurement procedures that are discussed in detail under Section 8 of this Chapter.

IHS procurement contracts that are above the small purchase limitation are the specific focus of this section. In addition, several procurement “special situations,” where the dollar value is less than the small purchase limitation, are also governed by the procedures discussed in this section as well as by other special terms and conditions.

These “special situations” include the acquisition of Architectural and Engineering Services discussed under Section 10 of this Chapter; Construction Contracting discussed under Section 11; Automated Data Processing and Telecommunications Contracting discussed under Section 12; and Contract Health Services referenced under Section 13.

- B. General. A procurement contract is used when the principal purpose of a transaction is to acquire supplies or services by purchase, lease, or barter for the direct benefit or use of the IHS from a non-Federal source, or when the IHS determines in a particular case that the use of a procurement contract is appropriate.

This Section is primarily concerned with the policies and procedures that govern the use of procurement contracts by the IHS to acquire supplies and services by purchase. IHS policies and procedures that concern leasing are discussed in detail under Section 18 of this Chapter.

- C. Policy. general, IHS policy is to use the most efficient and cost-effective procurement, contracting method, and procedures to achieve its acquisition objectives in furtherance of the overall Indian health care mission of the IHS.

(5-5.7 (C) Continued)

As detailed in Section 3 of this Chapter, the responsibility for conducting an effective and efficient IHS acquisition program proceeds from the Director of the IHS, to the HCA, to the PORA, to the SCO in each of the Awarding Activities Offices. A part of this overall responsibility entails knowledge and appropriate use of the correct procurement contract procedures by all who are involved with the procurement contract process, including the IHS Project Officer assigned to a particular contract requirement.

There are two basic methods for awarding Federal contracts: Sealed bidding and Negotiation. This Section examines each of these two approaches, including variations within each method, from the IHS policy perspective. The Section also considers the essential elements of any IHS procurement contract, the issue of selection of a contract type, and certain special considerations in IHS procurement, such as the Buy Indian policy requirements.

- D. Types of Contracts. The IHS utilizes both the Sealed bidding and Two-step sealed bidding methods in its acquisition of supplies and services. Within these two Sealed bidding methods, only Firm-fixed price and Firm-price with economic price adjustment contracts may be used. Sealed bidding is discussed in more detail under Subsection L; while Two-step sealed bidding is discussed under Subsection M.

IHS also uses the Negotiation method in its acquisition of supplies and services. Under the Negotiation method, there are two general categories of contracts: Fixed-price contracts and Cost-reimbursement contracts. Within each of these two general categories of Negotiated contracts, there are a number of different special types. Subsection N discusses contracting by Negotiation, and includes a list of the various different Fixed-price and Cost-reimbursement contracts that are generally used within the IHS.

- E. Determination of Acquisition Method and Selection of Contract Type. 'The nature of the procurement (i.e., the determination of exactly what is to be acquired) influences the method and type of contract. There are many additional factors the CO should consider in selecting and negotiating the contract type. As summarized from FAR 16.104, such factors include the following:

(5.5-7 (E) Continued)

- (1) Price competition. Normally, effective price competition results in realistic pricing, and a Fixed-price contract is ordinarily in the Government's interest.
- (2) Price analysis. Price analysis, with or without competition, may provide a basis for selecting the contract type. The degree to which price analysis can provide a realistic pricing standard should be carefully considered. (See FAR 15.805-2.)
- (3) Cost analysis. In the absence of effective price competition and if price analysis is not sufficient, the cost estimates of the offeror and the Government provide the bases for negotiating contract pricing arrangements. It is essential that the uncertainties involved in performance, and their possible impact upon costs be identified and evaluated, so that a contract type that places a reasonable degree of cost responsibility upon the contractor can be negotiated.
- (4) Type and complexity of the requirement. Complex requirements, particularly those unique to the Government, usually result in greater risk assumption by the Government. This is especially true for complex research and development contracts, when performance uncertainties or the likelihood of changes makes it difficult to estimate performance costs in advance. As a requirement recurs or as quantity production begins, the cost risk should shift to the contractor, and a Fixed-price contract should be considered.
- (5) Urgency of the requirement. If urgency is a primary factor, the Government may choose to assume a greater proportion of risk or it may offer incentives to ensure timely contract performance.
- (6) Period of performance or length of production run. In times of economic uncertainty, contracts extending over a relatively long period may require economic price adjustment terms.
- (7) Contractor's technical capability and financial responsibility.
- (8) Adequacy of the contractor's accounting system. Before agreeing on a contract type other than Firm-fixed-price, the contracting officer shall ensure that the contractor's accounting system will permit timely development of all necessary cost data in the form required by the proposed contract type. This

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(5-5.7 (E) Continued)

factor may be critical when the contract type requires price revision while performance is in progress, or when a Cost-reimbursement contract is being considered and all current or past experience with the contractor has been on a fixed-price basis.

- (9) Concurrent contracts. If performance under the proposed contract involves concurrent operations under other contracts, the impact of those contracts, including their pricing arrangements, should be considered.
- (10) Extent and nature of proposed subcontracting. If the contractor proposes extensive subcontracting, a contract type reflecting the actual risks to the prime contractor should be selected.

F. Definition of Requirements.

- (1) Specifications. Standards. and Purchase Descriptions. Specifications, standards, and purchase descriptions are used for IHS acquisitions when the nature of the supplies can be clearly specified, or when the required services can be clearly measured. The FAR, Part 10 prescribes policies and procedures for using specifications; standards, and other purchase descriptions in the acquisition process.

A “specification” is a description of the technical requirements for a material, a product, or a service that includes criteria for determining whether the requirements are met. A specification shall state only the Government’s actual minimum needs and be designed to promote full and open competition, with due regard to the nature of the supplies or services to be acquired.

A “standard” is a document that establishes engineering and technical limitations and applications of items, materials, processes, methods, designs, and engineering practices. Standards include any related criteria deemed essential to achieve the highest practical degree of uniformity in materials or products, or interchangeability of parts used in those products. Standards may be used in specifications, invitations for bid, requests for proposals, and contracts.

[S-5.7 (E) Continued]

A “product description” is the general, generic term for documents used for acquisition and management purposes, such as specifications, standards, voluntary standards, commercial item descriptions, or purchase descriptions.

A well-written specification clearly communicates technical requirements in language that is precise and unambiguous. Such clear language must communicate effectively to both technically and non-technically oriented personnel.

The PO is responsible for the preparation of the specifications, standards, and/or purchase descriptions for each acquisition period. If the specifications, standards and/or purchase descriptions are long or complex, the PO should discuss it with the CO during the drafting process to make them as clear as possible.

IHS personnel responsible for writing or approving specifications, standard, and other product descriptions must ensure that such descriptions state a balance between being as exacting and detailed as necessary to ensure that minimum Government requirements are met and at the same time encouraging full and open competition.

Use of the Sealed-bidding method of acquisition requires well-defined specifications, standards, and/or purchase descriptions. If the nature of supplies required makes it impossible to clearly define the Government’s need, or if the services required are not clearly measurable and quantified, the Sealed-bidding method of contracting shall not be used.

- (2) Statement of Work (SOW). The SOW is a critical document in the acquisition process. The SOW does the following:
- a. Describes the work to be performed or the services to be provided;
 - b. Defines the responsibilities of the IHS and the contractor, and
 - c. Provides an objective measure so that both the IHS and the contractor will know when the work is complete and payment is justified.

Formats for SOWs vary widely, but they always describe the objective, purpose, nature, and detailed requirements of the work to be performed.

(5-5.7 (F) Continued)

The PO is responsible for the preparation of the SOW. If the SOW will be long and complex, the PO should discuss it with the CO during the drafting process to make it as clear as possible.

G. Requisition Request for Contract.

- (1) HHS Form 393, Purchase/Service/Stock Requisition, is the official document authorizing the contracting office to initiate a procurement. The HHS Form 393 must be signed by the requesting and approving officials, and the designated funds certification official, and must provide a detailed description of the required supplies and/or services. Manual Exhibit 5-5.8-A contains a sample HHS Form 393.

For all proposed acquisitions greater than the small purchase limitation, the requisitioner prepares a Request for Contract (RFC) that has all of the items listed in HHSAR 315.70. The requesting official must review the RFC with the CO, or his/her representative prior to submission to ensure that it is complete.

After a procurement requisition is prepared and approved, contracting personnel should first determine whether the supplies or services can be provided from priority Government sources or preferred sources such as Buy-Indian or through open-market, commercial sources. Section 8 of this Chapter, which concerns Small Purchases, discusses the issue of vendor sources and priorities for both Government and commercial sources. Since the same basic vendor sources that are required for Small Purchase acquisitions must also be checked for larger procurement contracts, please refer to Section 8 for this detailed discussion.

- (2) Independent Government Cost Estimates. The PO must prepare a detailed independent Government cost estimate for all requisitions.

Unit-pricing, pricing by lot, or total pricing may be used when price is controlled by competition for specific off-the-shelf type items or services. The PO should include an estimate for the supplies or services to be obtained, and a notation as to how the prices are determined.

(5-5.7 (G) Continued)

A detailed cost estimate is required for all negotiated acquisitions and is preferred for all other types of IHS acquisitions. An estimate is required for all supplies and services to be obtained through the Negotiated Contract process. This estimate should include the following cost factors:

- a. Labor hours by category;
- b. Travel;
- c. Materials;
- d. Consultants;
- e. Subcontracting;
- f. Overhead;
- g. General and Administrative; and
- h. Fee.

The PO may seek the advice of contracting and cost advisory personnel in preparing the independent Government cost estimate.

Government cost estimates are privileged information and may not be disclosed to persons outside the Government or to any person without a compelling reason to know. The exception is a solicitation for construction, which includes an estimated price range in the solicitation.

- (3) Funding Certification. All requisitions must include a certification of the availability of funds, appropriations, and accounting citations. The designated funds certification official makes the certification. If funds are required from a future fiscal year, but are not currently available, then the statement that “this requirement is subject to the availability of funds” must be included in the RFC/Requisition so the contracting office is alerted.

When funds become available, the requisition must be re-certified by the designated funds certification official. The vehicle used for such funds re-certification is the HHS Form 393.

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15-5.7 (G) Continued)

If a contract award has been made subject to the availability of funds, a contract modification must also be issued to incorporate the available funds into the contract.

- (4) Approvals and Clearances. Some acquisitions require special approvals or clearances. Those that are applicable to a particular requirement must be listed in the RFC under the Section entitled "Special Approvals, Clearances, and Requirements. II Copies of the clearance must be attached to the RFC. If the approval or clearance has been requested, but not yet obtained, this must be noted in this Section.

The PO is responsible for obtaining clearances. If any clearances are required, the process should be started early to avoid any delays in the acquisition cycle.

Contracting personnel should carefully review the requisition to ensure that all clearances are included. Unless specifically provided for in the applicable regulations, a solicitation cannot be released without the applicable clearances,

The special approval or clearances required are listed in HHSAR 307,105-2 or other regulations and directives. They pertain to the following acquisitions:

- a. Automatic Data Processing;
- b. ADP Systems Security;
- c. Advisory and Assistance Services;
- d. Printing;
- e. Evaluation Contracts;
- f. Commercial Activities;
- g* Paid Advertising;
- h. Fraud, Abuse, and Waste;
- i. Paperwork Reduction Act;

(5-5.7 (G) Continued),

- j. Contracts with current or former Federal Employees;
- k. Classified Contracts;
- l. Publications;
- m. Public Affairs Services;
- n. Audiovisual (Videotape and Motion Picture Production);
- o. Privacy Act;
- p* Foreign Research Contracts;
- 9. Human subjects;
- r. Drug use.

- H. Contract Options. A contract option as defined in FAR Subpart 17.2 is a period specified in the contract when a Government agency may elect to purchase additional supplies or services, or may elect to extend the term of the contract.

A contract with an option provision allows the Government to buy a specified quantity or service, but also preserves the right to later buy additional amounts, or to extend the level of service at a set price during the term of the contract.

Solicitations must include option provisions and clauses if they are going to be in the contract. The solicitation must state the basis of evaluation, either excluding or including the option.

Contracts must specify limits for the purchase of additional supplies or services, or for extending the term of the contract. The contract must also state when the option may be exercised. Note, however, that a contract option may only be exercised prior to the current expiration date of the contract.

The CO must include in the file a justification of the quantities or terms under option, the notification period for exercising the option, and any limitation on the option price(s) under FAR 17.203(g).

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(5-5.7 (H) Continued)

Before exercising an option, the CO must determine in writing that:

- (1) The proposal option was originally publicized in the CBD; if not, the option must be readvertised for 30 days prior to its being exercised;
- (2) Items or services to be procured meet the terms of the option, and
- (3) The requirements of FAR 17.207 and FAR 17.204(e) have been met.

- I. Competition/JOFOC's. The basic policy of the Federal Government is to promote and provide for full and open competition in soliciting offers and awarding of contracts. Limited exceptions to this policy are allowed. The CO must follow carefully the procedures in FAR Subpart 6.3 concerning when it is necessary to limit competition, and shall include all elements required under FAR 6.303-2.

If a program office needs to obtain supplies or services by contract without full and open competition, it must give the CO a justification explaining why competition is not feasible, as required by FAR Part 6. For proposed procurements over the small purchase limitation, the program office must prepare a document titled "Justification for Other than Full and Open Competition" (JOFOC). This document must fully describe what is to be acquired and explain why it is not feasible to obtain competition. The JOFOC must also include evidence that the requirement has been synopsisized in the CBD and the results thereof clearly stated.

Each JOFOC must end with at least the following signatory lines (other concurrence lines may be added as necessary):

Recommended, Project Officer _____ Date _____

Concur, Project Officer's
Immediate Supervisor _____ Date _____

Concur, Program Director _____ Date _____

Concur, Contracting Officer _____ Date _____

Approved, Approving Official _____ Date _____

(5-S .7 Continued)J. Approval Levels for JOFOCs.

Within the IHS, approval levels for JOFOC's are as follows:

- | | | | |
|-----|--------------------------------|----|---|
| (1) | up to \$50,000 | -- | SC0 |
| (2) | \$50,001 to \$100,000 | -- | PORA |
| (3) | \$100,001 to
\$1,000,000 | -- | IHS Competition Advocate |
| (4) | \$1,000,001 to
\$10,000,000 | -- | Director, Office of Management, PHS |
| (5) | \$10,000,001 and over | -- | Assistant Secretary
for Management and
Budget, HHS. |

K. Synopsis in Commerce Business Daily. Prior to release of a solicitation for a specific contract, the CO is required by FAR 5.2 to publicize the contract in the Commerce Business Daily (CBD) for all proposed acquisitions over the small purchase limitation. Publication is not required when the CO determines in writing, on a case-by-case basis, that one of the exceptions in FAR 5.202(a) is applicable. The transmittal of the synopsis to the CBD requires 6 to 10 days.

When a CBD notice is required, the notice must be published at least 15 days before issuing a solicitation. Agencies must allow at least 30 days for response to a solicitation. A copy of the request for CBD synopsis and a copy of the CBD synopsis itself must be placed in the contract file.

FAR 5.207 requires agencies to use a standard format for transmitting synopses to the CBD.

L. Sealed Bidding. Sealed bidding is a contracting method that uses competitive bids and public opening of bids. The procedures for the use of "Sealed bidding" are prescribed under FAR. Part 14.

FAR 14.103-1 b requires that Sealed bidding be used whenever the conditions in FAR 6.401(a) exist.

L5-5.7 (L) Continued)

These conditions are:

- (1) Time permits the solicitation, submission, and evaluation of Sealed bids;
- (2) The award will be made on price and other price-related factors;
- (3) It is not necessary to conduct discussions with the responding offerors about their bids; and
- (4) There is reasonable expectation of receiving more than one Sealed bid.

Under FAR 14.104, only two contract types may be used in Sealed bidding:

- (1), Firm-fixed price, and
- (2) Fixed-price with economic price adjustment.

Firm-fixed price contracts are described under the FAR, Subpart 16.202, and Fixed-price with economic price adjustment contracts are described under the FAR, Subpart 16.203.

- M. Two-Step Sealed Bidding. Two-step sealed bidding is an acquisition method used to obtain competitive bids when the available specifications or other documentation describing the Government's requirements are not adequate for a normal Sealed bid procedure. Generally, Two-step sealed bidding is used in the purchase of complex items that requires both submission of technical proposals and the use of Sealed bids.

Two-step sealed bidding may be used when all of the following conditions are present:

- (1.1) Available specifications or purchase descriptions are not definite or complete, or may be too restrictive without technical evaluation and discussion;
- (2) Definite criteria exist for evaluating technical proposals;
- (3) More than one technically qualified source is expected to be available;
- (4) Sufficient time will be available for use of the two-step method; and

(5-5.7 IM) Continued]

- (3) A Firm-fixed price contract or a Fixed-price contract with economic price adjustment will be used.

The first step in the Two-step sealed bidding process involves issuing a Request for Technical Proposals (RTP). The request is announced in the CBD and requires that the offeror submit only technical information. No price estimates are required. All proposals are evaluated against a set of established criteria and determined to be acceptable, reasonably susceptible to being made acceptable, or unacceptable.

After the initial evaluation of offeror responses, clarifying information may be requested, and proposals are re-evaluated and determined to be acceptable or unacceptable.

Step 2: The second step consists of a formal sealed bidding process. It is limited to only those sources whose technical proposals were determined to be acceptable in the first step. Each offeror submits a bid based on its own acceptable technical proposal, and the award is made to the lowest responsible and responsive bidder.

This part of the acquisition is not to be publicly posted nor synopsisized in the CBD as an acquisition. However, the names of firms that have submitted acceptable proposals will be publicized in the CBD for the benefit of prospective subcontractors.

FAR Subpart 14.5 contains the guidelines and procedures for the -use of the Two-step sealed bidding procedure.

- N. Negotiation. FAR 15. I01 defines “negotiation” as contracting through Competitive or other-than-competitive proposals and discussions. Any contract that is awarded without using Sealed bidding procedures is a Negotiated contract.

If Negotiation is to be used rather than Sealed bidding, the CO must document in writing which of the four conditions under the preceding Subsection L have not been met, and this determination must be included in the contract file (except in the case of Architectural and Engineering (A&E) contracting). This determination should be included as part of the summary of negotiation; however, if a presolicitation review by IHS Headquarters is required, the determination should be documented in a separate memorandum.

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[5-5.7 (N) Continued]

Once proposals are received, the negotiation process allows bargaining and usually lets an offeror revise its offer before awarding a contract. Bargaining is defined as discussions, persuasion, attention to initial assumptions and positions, and give-and-take. Negotiations may apply to price, schedule, technical requirements, type of contract, or terms of a proposed contract.

Negotiation, unlike Sealed bidding, is relatively flexible. This flexibility provides the following advantages:

- (1) Allows consideration of a proposal that is reasonably susceptible to being made acceptable;
- (2) Promotes discussions;
- (3) Encourages innovation;
- (4) Allows flexible use of contract arrangements;
- (5) Permits factors other than price to be considered in determining who receives contract awards, and
- (6) Provides the opportunity to examine the contractor's estimated costs.

This flexibility may also create problems and increase the work for contracting and program personnel. The following problems may occur:

- (1) Pricing may be more difficult. Depending on the complexity and cost of the procurement, considerable time and effort may be involved. Cost analysis, price analysis, and/or price audits may be required that involve cost analysts or audit personnel.
- (2) Additional demands may be placed on the CO and PO. Extensive reviews and negotiations may be involved. The process requires extensive documentation to justify IHS actions and decisions.
- (3) More time may be required. The negotiation process can be lengthy, depending on the dollar amount of the project, complexity, and number of offerors involved.

(5-5.7 (N) Continued)

In contracting by Negotiation, both Fixed-price contracts and Cost-reimbursement contracts may be used.

The range of potential Fixed-price contracts generally used within the IHS includes:.

- (1) Firm-fixed-price contracts, described in FAR 16.202;
- (2) Fixed-price contracts with economic price adjustment, described in FAR 16.203;
- (3) Fixed-price incentive contracts, described in FAR 16.204;
- (4) Firm-fixed-price, level-of-effort term contracts, described in FAR 16.207;
- (5) Fixed-price requirement contracts, described in FAR 16.503;
- (6) Fixed-price indefinite-delivery contracts, described in FAR 16.501;
- (7) Fixed-price time-and-materials contracts, described in FAR 16.601;
- (8) Fixed-price labor-hour contracts, described in FAR 16.602.

The range of potential Cost-reimbursement contracts generally used within the IHS includes:

- (1) Cost-contracts, described in FAR 16.302;
- (2) Cost-sharing contracts, described in FAR 16.303 and HHSAR 316.303;
- (3) Cost-plus-incentive fee contracts, described in FAR 16.304;
- (4) C&t-plus-award fee contracts, described in FAR 16.305;
- (5) Cost-plus-fixed-fee contracts, described in FAR 16.306 and HHSAR 316.306.

FAR 16.103 indicates a preference for use of a Firm-fixed-price contract whenever possible, although Cost-reimbursement contracts often must be used. For contracts of relatively low dollar values, Firm-fixed-price contracts should be used, if possible.

15-5.7 (N) Continued)

A chart comparing the Sealed bidding and Negotiated contracting methods is provided under Exhibit 5-5.7-B, with a more detailed overview of each of these respective contract methods provided under Exhibit 5-5.7-C and Exhibit 5-5.7-D.

Other types of contracts that may be used less frequently within the IHS include: Incentive contracts described in FAR 16.4; and Letter contracts, described in FAR 16.603 and further discussed in the Subsection that follows.

0. Letter Contracts. A Letter contract, as defined by FAR Subpart 16.603-1, is a preliminary contractual instrument that authorizes the contractor to begin immediately manufacturing supplies or performing **services**.

A Letter contract may only be used when:

- (1) The Government's interests demand that the contractor be given a binding commitment so that work can start immediately; and
- (2) Negotiation of a definitive contract is not possible in sufficient time to meet the requirement.

Since a Letter contract is not a preferred contract instrument for use within the Federal Government, it is HHS policy to refrain from issuing Letter contracts. HHSAR Subpart 316.603 states that exceptions to this policy will be permitted only in cases where HHS and the contractor agree on all substantive matters (e.g., statements of work, delivery schedules, and general and special clauses).

The IHS PORA must approve all Letter contracts and their amendments. The CO must make a written determination that a letter contract (or amendment) is required. The letter is sent to the PORA with a memorandum that includes the information listed in HHSAR Subpart 316.603.70.

- P. Cost and Pricing Data. Under FAR 15.804.2, certified cost or pricing data is required before awarding a negotiated contract expected to be over \$100,000. FAR 15.803-3 allows exceptions to this requirement if one of the following conditions is met:

- (1) Prices are based on adequate price competition. This exists if offers are solicited, two or more responsible offerors submit responsive offers, and these offerors compete independently;

15-5.7 (P) Continued)

- (2) Prices are established by catalog or market price of commercial items sold in substantial quantities to the public; or
- (3) Prices are set by law or regulation.

When certified cost or pricing data are required, the contractor must complete a Certificate of Current Cost or Pricing Data and give it to the CO as soon as practicable after price agreement is reached. This certificate is included in the contract file. The format for the certificate is included in FAR 15.804-4.

Q- Technical Evaluation. The technical evaluation process is a critical element in negotiated procurement. The evaluation is conducted by program personnel selected to serve on a Technical Evaluation Panel. This process requires:

- (1) Review of all proposals;
- (2) Scoring of proposals;
- (3) Determination of acceptable and unacceptable proposals;
- (4) Ranking of proposals; and
- (5) Technical Evaluation Report of the technical proposals submitted by offerors which includes identification of the strengths and weaknesses of each offeror.

A technical evaluation panel is required for all negotiated acquisitions expected to exceed \$300,000.

If negotiated acquisitions are under \$300,000 but are complex, the CO may decide to have a technical evaluation panel, even though one is not required by regulation. For all other acquisitions under \$300,000, the PO may serve as the technical evaluator.

The technical evaluation panel shall be composed of three to five persons, and may include the PO as a voting member who may also serve as the chairperson at the discretion of the CO. Under the HHSAR, fifty percent of such panel must have successfully completed the DHHS PO training course. Under HHSAR 315.608-74, the CO must attend the initial meeting of the panel and explain the rules for conducting the evaluation. Written guidance shall be given to the panel if the CO is

15-5.7 (0) Continued)

unable to attend the initial meeting. The CO is strongly encouraged to have a representative present at all panel meetings.

Each evaluator must read each proposal, describe its strengths and weaknesses, and score the proposal. Evaluators use rating sheets developed in the technical plan or those approved by the CO. After the evaluators have discussed the scores, strengths, and weaknesses of each proposal, the panel will rank the proposals. The technical evaluation panel chairperson must ensure that numerical scores are consistent with the strengths and weaknesses identified.

Each proposal must be specifically identified as acceptable or unacceptable. Predetermined cutoff scores cannot be used.

The panel chairperson must submit a technical evaluation report to the CO. The report shall show each evaluator's score for every element evaluated for each proposal. It must also include a narrative evaluation of the strengths and weaknesses of each proposal. Copies of the scoring sheets must be included with the report. The panel should include any concerns or items that should be addressed in future negotiations (if any) with the offerors.

The CO reviews the report to be sure it is complete and accurate. It is especially important that the comments support the scores. If there are inconsistencies between the narrative and scores (i.e., high score--few strengths or low score--many strengths), the report shall be immediately returned to the panel for correction.

- R. Competitive Range. The technical evaluation Panel chairperson is responsible for ensuring that the panel's report supports the numerical rating and ranking, and that the scores are consistent with the strengths and weaknesses identified for each proposal reviewed. This report serves as the basis for the CO to establish the competitive range and is used in debriefings. It also may become a critical document in the event of a protest action.

In accordance with FAR 15.609 and HHSAR 3 15.609, the CO shall determine which proposals are in the competitive range for the purpose of conducting written or oral discussion.

All determinations regarding the inclusion or exclusion of proposals in the competitive range must be completely documented, including the salient reasons for the determinations.

(5-5.7 Continued)

- S. Prenegotiation Objectives. FAR 15.807 requires the CO to establish prenegotiation objectives before the negotiation of any pricing action conducted in the acquisition process. These objectives assist the CO in judging the overall reasonableness of proposed costs and in negotiating a fair and reasonable price.

Prenegotiation objectives shall be established in writing and signed by the CO prior to commencement of negotiations and shall be retained in the contract file. These objectives shall be detailed and shall address all pertinent issues, including all cost and fee objectives.

- T. Negotiations. The CO shall conduct written or oral discussions with all responsible offerors within the competitive range in accordance with FAR 15.610 and HHSAR 315.610. Discussions must be “meaningful,” i.e. ‘not merely perfunctory; and shall address all weaknesses identified as a result of the technical evaluation, as well as any other questions concerning the offerors’ technical and business proposals.

At the conclusion of negotiations, all offerors shall be afforded an opportunity to submit a “best and final offer” (BAFO) in accordance with FAR 15.611 which permits the offerors to revise or make any desired improvements in their proposals. A common cut-off date shall be established for the submission of BAFOs by all offerors.

Following receipt of BAFOs, a final evaluation of cost, technical, and other salient factors shall be performed in accordance with HHSAR 315.61 l(c).

- U. Responsiveness Versus Responsibility. It is important to distinguish responsiveness from responsibility. The apparent responsiveness of the bid is ascertained from the bid itself, not from extrinsic evidence or other information furnished by the contractor.

In contrast, responsibility focuses on the bidder’s ability to perform as promised. This involves, in part, a determination of the bidder’s capacity, credit, experience, integrity, past performance, and overall ability to perform.

The CO determines whether a bid is responsive to the solicitation. The bidder, however, can protest such determinations to the agency or to the GAO.

(5-5.7 Continued)

- V. Responsible Contractors. The CO is responsible for making a determination of responsibility of a prospective contractor in accordance with FAR, Part 9. To be determined responsible, a prospective contractor must--
- (1) Have adequate financial resources to perform the contract, or the ability to obtain them (FAR 9.104-3(b));
 - G9 Be able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and governmental business commitments;
 - (3) Have a satisfactory performance record (FAR 9.104-3(c));
 - (4) Have a satisfactory record of integrity and business ethics;
 - (5) Have the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them (including, as appropriate, such elements as production control procedures, property control systems, quality assurance measures, and safety programs applicable to materials to be produced or services to be performed by the prospective contractor and subcontractors). (FAR 9.104-3(b)).
 - (6) Have the necessary production, construction, and technical equipment and facilities, or the ability to obtain them (FAR 9.104-3(b); and
 - (7) Be otherwise qualified and eligible to receive an award under applicable laws and regulations.

The CO by signing a contract determines that the prospective contractor is responsible with respect to that contract. However, a determination of responsibility shall be documented in writing, in accordance with FAR 9.103(b) and HHSAR 3 15.672(b)(2), either as a separate document, or included as part of the summary of negotiations. If the CO determines the prospective contractor (other than a small business firm) is non-responsible, he shall document the basis and place it in the contract file.

If the CO determines that a small business firm is not responsible, the CO shall refer the matter to the appropriate Small Business Administration (SBA) office for a final responsibility determination. In the event the SBA determines the contractor to be responsible, the SBA shall furnish the CO with a certificate of competency. In the

/5-5.7 (v) Continued)

event that the SBA determines that the contractor is not responsible, then the CO determination shall stand.

- W. Preaward Site Visit. Before awarding a contract, there may be cases where a preaward site visit is required to determine the acceptability of facilities, laboratories, etc. as part of a responsibilities determination.

- ‘. X. Summary of Negotiations. After negotiations, the contract negotiator prepares a negotiation memorandum covering all the items specified in HHSAR 3 15.672. The memorandum must be signed by the negotiator.

The memorandum should be prepared with care and with attention to detail. It serves as a record of the entire process for an individual acquisition. It should have enough detail so that the reader of the document can understand the events of the procurement and the decisions made. It will be read by those approving the contract and will be a reference document in the event of protests or disputes.

- Y. Contract Award. Before awarding the contract, the CO must review the contract document and file to be certain that all requirements are met and that the file is fully documented.

All IHS contracts over designated thresholds contained in Exhibit 5.5-7-A must be submitted to the PORA, DCGP prior to award. Proposed awards must be submitted to DCGP for review no later than fifteen days prior to the expected award date, unless the CO justifies the need and arranges for an expedited review by the DCGP.

- Z. Post Award Guidance. Section 17 of this Chapter provides an overview of the post-award period, including a discussion of procurement contract administration, maintenance of the award files, and contract closeout.

- AA. Procurement Reviews.

- (1) Purpose. This Subsection prescribes the policy, responsibilities, and procedures to be used in conducting IHS Self-Assessment and Management Control Reviews.
- (2) Background. The PHS, Division of Grants and Contracts, performs Procurement System Reviews of all Contracting Offices under the PHS. These reviews are performed every five years. The IHS Self-Assessment and Management Control reviews are intended to supplement these PHS reviews.

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(5-5.7AA Continued)

- (3) Policy. It is IHS policy that the Procurement Review Guide (June 1993) developed by the Logistics Management Institute, as revised by the HHS, PHS will be used by all IHS personnel performing Self-Assessment and Management Control Reviews.
- (4) Procedures. The Procurement Review Guide, currently used throughout the HHS, will also be used in the IHS reviews in an effort to maintain consistency, prepare for the PHS reviews, identify areas of expertise, and serve as a means of comparing the procurement capabilities of IHS Area offices.
 - a. Self-Assessment Reviews. The Area Senior Contracting Officer at each of the IHS Area offices will ensure that Self-Assessment Reviews are conducted on all IHS procurements.
 - b. Management Control Reviews. The Director, DCGP, IHS, will ensure that IHS Management Control Reviews are conducted at least every three years at all IHS contracting offices. The Management Control Reviews will be conducted by teams composed of DCGP Procurement Analysts, Area office personnel with required expertise, and/or any other individuals deemed appropriate by the DCGP Director.

AB. Unsolicited Proposals

- (1) Purpose. This section establishes the IHS policy for acceptance and evaluation of unsolicited proposals. It supplements the guidance provided in the Federal Acquisition Regulation (FAR) 15.5 and Health and Human Services Acquisition Regulation (HHSAR) 315.5.
- (2) Background. Section 15.506(a) of the FAR requires agencies to establish procedures for controlling

(5-5.7AB(2) Continued)

the receipt, evaluation, and timely disposition of unsolicited proposals. Section 315.506(a) of the HHSAR designates the Principal Official Responsible for Acquisition (PORA) as the individual responsible for establishing the procedures.

- (3) Policy. The policy of the IHS is to foster and encourage the submission of unsolicited proposals. Unsolicited proposals are a valuable means by which unique or innovative methods or approaches that originated or were developed by private and other public sector organizations can be made available for use by the IHS in accomplishing its mission. An unsolicited proposal is not an advance proposal for a known agency requirement that can be acquired by competitive methods.

(4) Procedures.

- a. The Division of Contracts and Grants Policy (DCGP) is designated as the IHS Coordinating Office as defined in FAR 15.501. The PORA or his/her designee is the IHS point of contact for receipt and handling of unsolicited proposals.
- b. Area Senior Contracting Officers must designate an individual within the respective Area office to be the IHS point of contact for receiving and handling unsolicited proposals within the Area. The Area point of contact must maintain a list of all unsolicited proposals that are received in the Area office. The format for this list is in Exhibit E.
- c. All inquiries for information on the procedures for unsolicited proposals must be directed to the Area point of contact. The Area point of contact must inform potential offerors of:

(5-5.7AB(4)c.(i) Continued)

- (i) The requirements of FAR 15.504.
- (ii) Necessary contents of unsolicited proposals as outlined in FAR 15.505(d).
- (iii) The Government's process of handling information that the offeror does not want disclosed for any purpose other than evaluation, and provide the offeror with a copy of the restrictive legend in FAR 15.509(a). Offerors will be advised that this legend must be on the title page of the proposal and that each restricted sheet in the proposal must be identified as indicated in FAR 15.509(b). A sample legend is in Exhibit F.

Offerors must be advised that in the event none of the information in the proposal is restricted, a written statement must be provided by the offeror that indicates he/she does not wish to impose any restrictions on the information included in the proposal.

- (iv) Explain the requirement in HHSAR 315.505(d) for the offeror to complete an unsolicited Proposal Certification By Offeror to ensure against contacts with Government personnel that would result in an unfair advantage to the offeror. Offerors must be provided a copy of the certification. Exhibit G is a sample certification document.

- (VI) Direct the contractor to submit
 - (a) the proposal (original + 2 copies), (b) the completed certification, and (c) either the restrictive legend or a statement that cites there are no restrictions on the proposal content, to the appropriate IHS Area point of contact.

(505.7AB(4) Continued)

- d. Upon receipt of an unsolicited proposal the Area point of contact must:
- W* Assign a control number and enter the unsolicited proposal into the control log.
 - (ii) Review the proposal to determine if it contains sufficient technical and cost information.
 - (iii) Ensure that the proposal has been approved and submitted by a responsible official or other representative authorized to contractually obligate the offeror.
 - (iv) Ensure the offeror has complied with the marking requirements of FAR 15.509 or submitted a statement waiving restriction.
 - (VI) Ensure the offeror has completed the unsolicited Proposal Certification By Offeror" form.
 - (vi) Ensure that offerors are notified in writing of receipt and acceptance of proposals that meet the above requirements. A sample acknowledgement letter is provided in Exhibit H.
 - (vii) When a proposal does not contain information sufficient to meet the requirements for acceptance, the Area point of contact must provide the offeror an opportunity to submit the required data.

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(S-5.7AB(4) Continued)

e. Acceptable proposals must be considered in an objective and timely manner.

(i) The Area point of contact must place a cover sheet on each copy of the proposal that contains restrictive data (see Exhibit I).

(ii) The proposal copies must be distributed to appropriate IHS staff for a comprehensive evaluation as described in FAR 15.506-2. Proposal evaluators must submit their comments and recommendations to the Area point of contact in writing. A sample request for proposal evaluation is provided in Exhibit J.

f. Copies of all proposals received and evaluated at the Area office level must be forwarded to the PORA in DCGP. The Area point of contact must ensure that the following documents are included in the transmittal to the PORA:

W A copy of the offeror's proposal and certification.

(ii) Documentation indicating that the offeror was provided the advance guidance outlined in paragraph 4c. above, and that the initial review required by paragraph 4d. above was accomplished.

(iii) A copy of all comments and recommendations made by IHS staff during the comprehensive evaluation required by paragraph 4e.

(5-5.7AB(d)f Continued)

(iv) ,A written recommendation for disposition of the proposal from the Area Senior Contracting Officer.

(a) A favorable recommendation must be accompanied by a Justification for other than Full and Open Competition (JOFOC).

(b) Unfavorable recommendations must include a "draft" rejection letter from the Area Senior Contracting Officer to the offeror.

g* The PORA will direct a review of the documentation and ensure that the Area point of contact is provided one of the following decisions:

(i) Concurrence with the Area Senior Contracting Officer's decision by the PORA to reject the proposal and approve the "draft" letter for release to the offeror with or without revision.

(ii) Concurrence with the Area Senior Contracting Officer's decision to proceed with a contract and advise the Area Senior Contracting Officer to synopsize the requirement. Approval of the JOFOC must be in accordance with agency procedures.

(iii) When the result of the PORA directed review is nonconcurrence with the recommendation made by the Area Senior Contracting Officer the PORA will discuss the proposal with the Area Senior Contracting Officer and staff in the IHS Coordinating Office to reach a consensus.

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(5:5.7AB(4) Continued)

- h. copies of all unsolicited proposals received at the IHS Coordinating Office will be forwarded to the Small and Disadvantaged Business Utilization Specialist (SADBUS) for informational purposes. This is to ensure that the SADBUS updates his/her source list of small business, small-disadvantaged businesses, woman-owned businesses, and labor surplus area concerns.

- (5) In the event that an unsolicited proposal involves an IHS-wide procurement, the responsible Area Office; determined by the address of the offeror, will perform the functions outlined in this section. When it is determined that a contract can be awarded on an unsolicited proposal, all documentation required for a national contract award will be forwarded to the DCGP.

5-5.7AC Personal Services Contracting

- (1) Purpose. This section establishes the IHS policy and procedures for the acquisition of medical and professional services, to include experts and consultants. This policy applies to contracts awarded for personal services with either individuals or organizations for the provision of services in facilities owned, operated, or constructed under the jurisdiction of the IHS. This supplements the general policy and procedures prescribed in the Federal Acquisition Regulation (FAR) Subpart 37.1 and Health and Human Services Acquisition Regulation (HHSAR) Subpart 337.1.
- (2) Background- The FAR Subpart 37.104(b) states that agencies must not award personal services contracts unless specifically authorized by statute to do so.
 - a. The statutory authority for IHS to enter into personal services contracts for the provision of services in facilities owned, operated, or constructed under the jurisdiction of the IHS is P. L. 103-332, Department of the Interior and Related Agencies Appropriation Act, Title II, September 30, 1994, 108 Stat. 2530, as implemented by 25 U.S.C. 1638~.

(5-5.7AC(2) Continued)

- b. The administrative provisions of P.L. 103-332, as implemented by 5 U.S.C. 3109, provide IHS with the authority to enter into contracts for the temporary, or intermittent provision of expert and consultant services. The rates of the contract are not, to, exceed the per diem rate equivalent to the maximum rate payable for senior-level positions.
- (3) Policy. Beginning in FY 1995, it is the policy of the Department of Health and Human Services that when resources are not sufficient to support the mission of the agency, personal services contracts authorized by the administrative provisions of P.L. 103-332 may be executed.
- a. As defined by the FAR 37.101, a personal services contract is a contract that, by its expressed terms, or as administered, makes the contractor's personnel appear to be Government employees. This is characterized by the employee-employer relationship created between the Government and the contractor's personnel. The descriptive elements used in assessing whether or not a proposed contract is personal in nature are provided in the FAR Subpart 37.1.
 - b. It is the purpose of personal services contracts to: (1) facilitate accomplishment of the IHS mission; (2) maximize beneficiary access to IHS facilities; (3) enhance quality of care by promoting the continuity of the patient/provider relationship; and (4) ensure adequate services for facilities under construction.
 - c. The following may be used as a guide in determining which personal services statutory authority is appropriate: (1) when qualified career employees cannot be hired; (2) during times of increased cyclical or seasonal workload; (3) when the workload is variable or does not conform to the standard workweek; (4) during the extended absence of an IHS employee; (5) to accomplish a project or

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(5~5.7AC(3)c Continued)

function that has a specified termination date; and (6) to accomplish a project or function that has limited and/or reimbursable funds, e.g., Medicare, Medicaid, private insurance, and research grants.

(4) Requirements.

- a. Personal services contracts are not to be used to circumvent civil service hiring practices or to displace a current permanent Federal employee.
 - (i) The acquisition of medical and professional personnel in support of the IHS mission is authorized by U.S.C. 1638~.
 - (ii) Expert or consultant services, as authorized by 25 U.S.C. 3019, are to be obtained in accordance with the FAR Subpart 37.104(f).
 - (iii) Temporary services, such as clerical services, are to be obtained by employing private sector temporaries in accordance with the FAR Subpart 37.112.
- b. So far as may be practicable, Contracting Officers must ensure that the Buy Indian Act (25 U.S.C. 47) authority is utilized to the maximum extent possible when awarding personal services contracts. The HHSAR Clause 352.270-2, Indian Preference may be appropriate for acquisitions under the simplified acquisition threshold.
- c. Prospective contractors are subject to the same quality assurance, credentials, licensure, and qualification standards as required of IHS personnel. In addition, health care providers, other than

(595.7AC(4)c Continued)

paraprofessionals, must be licensed in the United States, the District of Columbia, Puerto Rico, or a Territory of the United States to perform the contract services within IHS facilities. Contracting Officers must insert the following certification statement in all purchase orders and contracts for professional medical services:

My license to practice [] has [] has not been terminated, suspended, or revoked in any State, the District of Columbia, Puerto Rico, or a Territory of the U.S.

I currently hold an active medical license in the following State(s):

State	License No.	Issue Date
_____	_____	_____
_____	_____	_____
_____	_____	_____

I currently hold an inactive medical license in the following State(s):

State	License No.	Inactive Date
_____	_____	_____
_____	_____	_____
_____	_____	_____

I hereby certify that for the purposes of the provisions of the Program Fraud Civil Remedies Act of 1986 (45 CFR 79), that to the best of my knowledge, each of the above statements is true, accurate, and does not omit any material fact that would render the statement false, fictitious, or fraudulent as a result of the omission.

Signature of Practitioner

Date

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(5-5.7AC(4) Continued)

- d. Pursuant to P.L. 103-226, the Federal Workforce Restructuring Act of 1994, an employee who has received a voluntary separation incentive payment and enters into a personal services contract within 5 years after the date of separation shall be required to repay to the Agency the entire amount of the incentive payment.
- e. Prospective contractors whose duties and responsibilities involve regular contact or control over children are subject to a character investigation as required by P.L. 101-630, the Indian Child Protection and Family Violence Prevention Act. Manual Exhibit 5.5-7-K lists the positions subject to character investigations. The IHS personnel offices will conduct these investigations following award of a personal services contract. The character investigation may be waived if, in the judgement of the Contracting Officer, in consultation with the Personnel Officer, an investigation has already been conducted and is on file. Until the character investigation has been completed and the Contracting Officer notified of the results, the contractor must not have unsupervised contact with Indian children.
- f. The Federal Tort Claims Act coverage for medical related claims is extended to individuals providing services pursuant to these contracts. The services performed must have been within the scope of the personal services contracts.

(5) Procedures*

a. Responsibilities.

- (i) The DCGP is responsible for oversight of the personal services contracting process within the IHS.
- (ii) Each Area Senior Contracting Officer and the Contracting Officers for the

(505.7AC(5)a Continued)

IHS Engineering Services offices are responsible for the administration and management of contracts entered into pursuant to this authority, ensuring that effective means of obtaining adequate quality services are achieved in compliance with the FAR, HHSAR, and other applicable policies, guidelines, and directives, including the Buy Indian Act.

b. Award and Administration of Personal Services Contracts.

0) As prescribed in the FAR Subpart 13.103(d), the simplified acquisition procedures may be used to acquire personal services when the total aggregate value of the acquisition and any options do not exceed \$50,000 and the requirements in HHSAR Subpart 313.104(i) are applicable. The procedures cited in 13.103(g) may be used in concert with this authority when appropriate.

(ii) Contract actions exceeding the simplified acquisition threshold are awarded and administered pursuant to the provisions of the FAR Part 37, the HHSAR Part 337, this chapter, and other applicable policy, guidelines, and directives.

c. Accountability.

(i) The IHS supervisors, in order to establish lines of authority and accountability, may direct the activities of personal services contractors on the same basis as IHS employees. Each contract with an individual or an entity, such as a professional corporation or partnership, must contain language that indicates the contractor

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(505.7AC(S)c Continued)

acknowledges that the contract performance is subject to the supervision and direction of a duly authorized Federal officer or employee, i.e., Project Officer or alternate.

- (ii) The contract must contain a detailed description of the monitoring procedures used by the IHS to ensure contract compliance. This description must also specify the Project Officer or alternate responsible for verifying contract compliance.

d. Posting and Synopsis Requirements.

Acquisitions for personal services contracts, exceeding \$25,000, may be exempt from the posting and synopsis requirements of the FAR Part 5, when the Contracting Officer provides adequate advance notice of contracting opportunities to potential contractors within the geographic vicinity the services are to be performed.

- (i) Prospective contractors shall be solicited through at least one publication that serves the geographic vicinity of the health facility. The notice must include the qualification criteria against which the prospective contractors responding will be evaluated.

- (ii) On the basis of simplified acquisition, requests for quotations or solicitations must state the basis upon which award is to be made. When the award is to be based on other than price related factors, the evaluation factors located in Section 5.13 of this Chapter may be used as a guide.

e. Evaluation.

- (i) The FAR Subparts 13.106-1 and 13.106-2 must be used when the simplified acquisition procedures are used.

(505.7AC(5)e Continued)

- (ii) See the FAR Subpart 15.608(3), HHSAR Subpart 315.15, and Section 5.7 of this Chapter for proposed contracts exceeding the simplified acquisition threshold.
- f. Negotiations Competitive negotiation procedures must be used in the acquisition of personal services contracts.
 - (i) The FAR Subparts 13.103(g) and 13.106-1 may apply when the simplified acquisition procedures are used.
 - (ii) The procedures prescribed in the FAR Subparts 15.101, 15.605, 15.608, 15.609, 15.610, and 15.611, the HHSAR Subpart 315.6, and the IHM Chapter, Section 5-5 are to be used when the proposed contract exceeds the simplified acquisition threshold.
- g* Provisions and Clauses All Required, Required when Applicable, or Optional Clauses must be incorporated into the resultant contract, purchase order or modification. Unless specifically prohibited or inapplicable, the Contracting Officer may use clauses determined to be appropriate for a particular acquisition.
 - (i) The Solicitation provisions and contract clauses (Matrix) in the FAR Subpart 52.301 and the HHSAR Part 352 must be used to ensure compliance.
 - (ii) In addition to FAR Subpart 52.301, the provisions and clauses cited in Subpart 13.111 are inapplicable at or below the simplified acquisition threshold. Options may be included in acquisitions when the simplified acquisition procedures are used provided that the requirements of Subpart 17.2 are met and the aggregate value of the acquisition and all options does not exceed the simplified acquisition procedures dollar threshold.

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(505.7AC(5) Continued)

- h. Cancellation of Requirements If a fair and reasonable price cannot be obtained from a responsible prospective contractor, the requirement should be canceled. The services may then be acquired using procedures other than those established for personal service contracts.
- i. One Response to an Advertised Requirement;
In the event that only one prospective contractor responds to an advertised requirement, the Contracting Officer is authorized to enter into negotiations and award a contract. In this case the contractor must meet the minimum qualifications of the requirement and the Contracting Officer must determine that the price is fair and reasonable.
- j. Compensation.
 - (i) The personal services contractors are compensated only for periods of time actually devoted to the delivery of services required by the contract. Each contract must provide for compensation for time actually worked, (e.g., per day, per week, per month) or provide for performance of a specific task at a fixed price. The amount or rate of payment must be determined on a case-by-case basis.
 - (ii) The Contracting Officers must make a written determination of the reasonableness of compensation to be provided under the contract taking into consideration the relative importance of the duties to be performed, the stature of the individual in his/her specialized field, comparable pay positions under the Classification Act or other Federal pay systems, rates paid by private employers, and rates previously paid for similar work.

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(5-5,7AC(5)j Continued)

- (iii) The Contracting Officers should obtain advice from the Personnel Officer concerning equivalent rates for Federal hires.

5-5.8 SMALL PURCHASES

:

- A. Overview. “Small -Purchase” procedures are required to be used within the IHS for the procurement of supplies, nonpersonal services, or construction services when the “aggregate dollar amount” of the acquisition is at or below the “small purchase limitation” that is established by Federal regulations.

Specific Federal regulations that concern small purchases are found in the FAR, Parts 8 and 13, and in the HHSAR. Part 313.

- B. General. Purchase procedures are used for purchasing supplies, nonpersonal services, and construction services from open-market commercial sources when the “aggregate dollar amount” for any one transaction does not exceed the current “small purchase limitation.” This “aggregate dollar amount” includes all costs of the order, including freight and handling charges paid to the supplier..

The following eight items are important considerations in the small purchase process:

- (1) Purchases at or below the small purchase limitation threshold are reserved exclusively for small business concerns, except in unusual circumstances.
- (2) An individual order-or known requirement cannot be split to permit negotiation under small purchase procedures, or to otherwise avoid the small purchase limitation. Likewise, a group of items that would be properly grouped together, (such as several requests for electronic supplies), shall not be divided into more than one order to avoid this threshold. (Refer to FAR 13 103(c).)
- (3) Certain types of IHS acquisitions cannot be accomplished using small purchase procedures, regardless of aggregate dollar value. These limitations are noted in Subsection C, below.
- (4) IHS small purchase procurements start with a properly completed and approved requisition.
- , (5) The IHS is required to first check for availability of a supply or a service from a priority list of sources of supplies and services. These sources must be used in priority order, as established by regulations in the FAR. Discussion of the priority list for supplies is contained in Subsection I, and for services under Subsection 1.

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(5-5.8 (B) Continued)

When no priority source is available, open-market commercial sources may be used to procure supplies or services. Among commercial sources, first priority must be given to Indian-owned economic enterprises under the Buy Indian Act, and to other special set-aside businesses, such as those discussed under Section 3, Subsection J of this Chapter.

- (6) When the small purchase amount is 10 percent or less of the small purchase limitation, FAR 13.106 allows the CO to purchase directly from commercial sources without securing competitive quotations. (See Subsection D below for further discussion.)
- (7) Above the 10 percent limitation, either oral or written quotations must be solicited before a small purchase source is selected. (See Section 8D, which follows, for a discussion of exceptions.)
- (8) Small purchase awards for the procurement of supplies or services are made to commercial vendors by the IHS by using the special small purchase procurement methods described in FAR Part 13.

C. Limitations. Small purchase procedures cannot be used for:

- (1) Acquisitions made by sealed bidding or by competitive proposals that originally were estimated to cost more than the small purchase limitation, but will cost less than the small purchase limitation on the basis of bids received;
- (2) Small purchases initially estimated to be under the small purchase limitation, but which will cost more than this threshold, based on actual quotations received;
- (3) Acquisition of architectural/engineering professional services of any dollar amount
- (4) Acquisition of supplies or services on a cost-reimbursement basis;
- (5) Acquisition of research and development, complex studies and services, or other requirements that require judgmental technical evaluations, or negotiations where the award cannot be made confidently on the basis of price alone; or

(S-5.8 (C) Continued)

- (6) “Off-the-shelf” training courses which can be obtained directly by an agency’s Personnel Office.

If small purchase procedures are used to obtain expert and consultant services, care must be exercised to avoid placing a personal service contract. Refer to FAR 37.2 and HHSAR 337.2 for guidance in the acquisition of expert and consultant services using small purchase procedures.

- D. 10 Percent Rule. A basic principle of Government acquisition is that supplies and services should be obtained through the competitive process. However, the administrative costs of obtaining competition for relatively low dollar small purchases may offset the savings from competition.

Under FAR 13.106(a), small purchases under 10 percent of the small purchase limitation may be made without competitive quotations if the CO considers the prices to be reasonable. Good judgment should be used to determine if a number of quotations are needed. Repetitive purchases should be rotated among price-competitive sources, if practical.

- E. Above 10 Percent: Solicitation of Competitive Quotations. For purchases over 10 percent of the small purchase limitation, the solicitation of competitive quotations is required when using commercial sources (generally from at least three sources). The following factors should be considered when determining the number of sources to solicit:

- (1) The type of product or service;
- (2) Previous information available;
- (3) Urgency of the proposed acquisition;
- (4) Dollar value; and
- (5) Past experience.

If only one response is received, or the prices obtained indicate there was not adequate competition, a statement must be placed in the file describing why the price quoted is determined to be fair and reasonable.

[5-S .8 Continued)

If only one source is solicited, the file must be documented to clearly indicate the reason for the lack of competition. As specified in HHSAR 3 13.106(c)(2), the justification may be in the form of a statement on the requisition.

F. The Request for Quotations. Solicitations for supplies or services at or under the small purchase limitation may be obtained either orally or in writing, except in the case of construction services where all solicitations over \$2,000 must be in writing.

- (1) In many cases, oral solicitations, generally by telephone, are sufficient for small purchases.
- (2) Written solicitations are appropriate in the following situations:
 - a. There are many items to be purchased making verbal quotations lengthy and difficult;
 - b. A specification is involved that cannot be adequately communicated over the telephone;
 - c. The firms are outside the local area; or
 - d. Verbal quotations are not sufficient.
- (3) When a written solicitation is required, a Request for Quotations (RFQ) (SF-18) should be used. When using the SF-18, terms and conditions pertinent to the request and necessary for the purchase, including any special terms and conditions, may be added by the purchasing agent. Guidance is contained in FAR 13.505-1(b) and 13.507. Amendments to the RFQ must be in writing. Awards resulting from RFQ's should generally be made using an OF 347, Order for Supplies or Services.

G. The Requisition.

- (1) Unless a Government purchase card is used, a requisition is required to begin a small purchase procurement action within the IHS. (See Section j-5.80(5) for further discussion of Government purchase cards.)
- (2) A requisition is both a request and an authorization to procure supplies or services. A properly prepared requisition includes a clear, complete, and accurate description of the item or service required; certification of required

15-5.8 (G) Continued)

funds for the proposed acquisition; required delivery date; suggested sources of supply--such as identification of any special or unusual aspects such as the use of Government property, special transportation requirements, etc.--and all required clearances reviews, and approvals.

- (3) The HHS-393, Purchase/Services/Stock Requisition, (Exhibit 5-5.8-A) is the prescribed form for use when requisitioning supplies or services within the IHS. A properly prepared HHS-393 must be submitted for each proposed procurement unless a Government purchase card is used.

- H. Basic Categories of Vendor Sources. After receiving and reviewing a small purchase requisition, contracting personnel must decide the best source from which to obtain the supplies or services.

There are two basic vendor source categories for IHS small purchases: required sources of supplies and services, and open-market commercial sources.

Priorities in the selection of vendor sources are established both by Federal law and regulation and must be followed when using either required or commercial sources. The priorities in the use of vendor sources differ, however, when supplies are purchased and when services (including construction services) are purchased. See Sections 8I and 8J, which follow, for a description of these differences.

- I. Source Priorities for the Acquisition of Supplies. If the IHS requisition is for supplies, IHS procedures require that the sources listed below must be checked first, and the supplies purchased from the highest rank order priority source, if possible, before considering procurement from a commercial source.

The priority order for consideration of vendor sources when procuring supplies is as follows:

- 1st -- Agency Inventories. The IHS supply management system includes various depots and stores, including the Supply Service Center at Perry Point, Maryland, that stock items that are in heavy demand.

Perry Point is a full service medical supply center that provides pharmaceuticals, medical, and dental supplies to over 1,800 health care facilities worldwide. Perry Point currently maintains an inventory of approximately 3,000 different items. Because of volume purchasing, Perry Point usually receives significant discounts from its suppliers.

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(5-5.8 (I) Continued)

The respective Area IHS Property Management Office should also be contacted to see if suitable excess Agency inventory is available.

- 2nd -- Excess from Other Federal Agencies. Each GSA Regional Office distributes catalogs and bulletins that list available items. These items range from office furniture to scientific and technical equipment. The respective Area IHS Property Management Officer should be contacted to see if suitable excess property is available.

- 3rd -- UNICOR. (Federal Prison Industries) is a Government corporation that provides training and employment for prisoners in Federal Correctional institutions. Agencies must order from UNICOR if they can provide the item.

A clearance must be obtained from UNICOR before using other sources of supply where UNICOR produces similar items. The UNICOR Schedule and exceptions to ordering from UNICOR are in FAR 8.6.

- 4th -- Committee for Purchase from the Blind and Other Severely Handicapped. Federal law requires all Federal departments and agencies to buy brooms, mops, brushes, and other suitable commodities from nonprofit “workshops” for the blind and other severely handicapped. Many workshop products are purchased directly by GSA and placed in their stores for later purchase by other agencies. These products can be ordered directly from GSA through normal FEDSTRIP procedures.

To get products or services not stocked by GSA, a request should be made for an “allocation” from a nonprofit central agency that represents certain workshops, or an order should be placed directly with a particular workshop. The proper method is found in the Procurement List published by the Committee for the Blind and Other Severely Handicapped. Permission must be obtained before using a source for supplies other than those produced by the Committee. Exceptions to ordering from the Committee are in FAR 8.706.

- 5th -- Wholesale Government Supply Sources. GSA, through its Federal Supply Service, is a primary supplier of personal property and nonpersonal services of Federal civilian agencies. Items available from GSA are found in one of several GSA Supply Catalogs, which may be obtained from GSA.

(j-5.8 (I) Continued)

GSA also has Customer Supply Centers located throughout the country. These stores provide items available through the supply catalog as well as other locally-used, expendable items such as copy machine paper.

The GSA Supply Catalog is a mandatory source of supply. If items are not available from other higher-priority sources, the contracting activity must order from the catalog unless one of the following exceptions applies:

- a. The value of a line item is less than \$500.
- b. The items are required to meet public emergency needs (e.g., fire, flood, national disaster, et cetera). The file must be documented to show the urgent need and the nature of the exigency.
- c. The items meet unforeseen day-to-day requirements.
- d. The same items are available from a Federal Supply Schedule & are lower in cost.
- e. The requirement is for marginally punched forms or blank paper and envelopes for delivery in the District of Columbia and can be obtained through the Government Printing Office.
- f. The GSA item will not serve the intended purpose. A waiver must be obtained from the Commissioner, FSS, before a purchase from other sources can be made.

Other stock programs include the Defense Logistics Agency (DLA) and the Department of Veterans Affairs (DVA). DLA supplies items such as fuel, lubricants, and packaged petroleum products through the Defense Fuel Supply Center (DFSC). The DVA keeps a stock of medical items.

- 6th -- Priority Federal Supply Schedules. Federal Supply Schedules (FSS) are contracts awarded by GSA with many suppliers for a variety of goods and services. Federal Departments and agencies use these schedules to obtain these goods and services by placing delivery orders against established scheduled contracts. The Federal Supply Schedule Program Information (in the GSA Supply Catalog) has a complete list of the supplies and services available, and specific instructions on how to use them. The schedules identify agencies required to use them as a required source of supply. Exemptions to the priority use of Federal Supply Schedules are as follows:

{5-5.8 (I) Continued}

- a. **Urgent Requirements.** A schedule is not required for use when the specified delivery period is shorter than that provided by the schedule and the contractor is unable to meet it. The file must be documented as to the need for the shorter delivery time.
- b. **Small Requirements.** An order for less than the minimum amount specified on the individual schedule. However, this does not preclude requesting, nor the contractor accepting, orders below the minimum amount.
- c. **Maximum Order Limitation.** Each schedule has a maximum dollar value, and an order may not be submitted above this amount. For purchases above these amounts, a FEDSTRIP must be prepared and sent to the appropriate GSA Regional Office. A one-time authority to buy on the open market to meet the requirements may also be requested.
- d. **Geographic Location.** A schedule is not required to be used if a location is not provided for under the contract,
- e. **Lower Prices for Identical Items.** Schedule use is not required if the identical -item is available at a lower price from another source.

When an ordering office, that is a required user under a schedule, determines that items available from the schedule will not meet its specific needs, but similar items from another source will, FAR 8.404-3 requires such ordering office to submit a request for waiver to the Commissioner, Federal Supply Service, GSA, Washington, DC 20406. Requests for waiver must include the following:

- a. A complete description of the item requested including any descriptive literature, drawings, etc.;
- b. A comparison of prices and pertinent technical differences between the item requested and the GSA item;
- c. The inadequacies of the GSA item in performing required functions;
- d. Advantages of the item requested, such as technical or cost considerations;
- e. The quantity required, including anticipated future requirements; and

IS-j.8 (1) Continued)

§* Estimated annual usage or statement that the requirement is non-recurrent or unpredictable.

GSA must approve the request for a waiver before a supply item can be purchased from a non-schedule source, except as otherwise provided in inter-agency agreements.

7 t h - Optional Federal Supply Schedules. If an FSS schedule is optional, orders may still be placed with the schedule contractor. The schedule contractor is not required to accept orders from Federal Departments or agencies that are not required users of the schedule; however, contractors often are willing to accept such orders. If a schedule contractor refuses an order, the purchase may be made from a lower-priority source without special justification.

- J. Commercial Sources. “Commercial sources” are open-market commercial suppliers. Generally, commercial sources are for-profit businesses, but also may be educational institutions or nonprofit entities.

There are a number of ways of identifying sources. The IHS originator of the requisition or RFC is required to provide a list of recommended sources with the requisition or RFC which includes the previous provider of such supplies, if any. Also a “Bidder’s List” is usually maintained by the respective Contracting Office. The local yellow pages or telephone directories and a number of registers, such as the Thomas Register of American Manufacturers, also are used.

- K. Commercial Source Set-Asides. Before considering a small purchase acquisition from any other commercial source, two priority set-aside sources must be considered in the following sequence: first, Indian-owned economic enterprises under the Buy Indian Act; then, Second, small and economically disadvantaged, business concerns. The priorities is discussed, in turn, in the paragraphs that follow.

- (1) PHSAR 380.501 requires that supplies and services be purchased from Indian-owned economic enterprises pursuant to the Buy Indian Act whenever it is practical to do so.
- (2) After Indian-owned economic enterprises are considered, purchases at or below the small purchase limitation are reserved exclusively for small business concerns unless the CO decides that obtaining quotations from two or more responsible small businesses is unlikely.

(S-5.8 (K) Continued)

The businesses must be competitive in price, quality, and delivery. The requirements for the small business/small purchase set-aside are found in FAR 13.105 and HHSAR 313.105.

If the CO receives only one quotation with a reasonable price from a responsible small business concern under a small business/small purchase set-aside, the CO is to make an award to that small business.

If the CO determines that a small purchase shall be made on an unrestricted basis (e.g., full and open competition), and not from a small business, the CO must document in writing the reason for this decision, in accordance with HHSAR 313.105.

Although labor surplus and women-owned small business set-asides are not required for small purchases, efforts should be made to make awards to these firms, when possible, and to maintain records for reporting purposes.

Additional information concerning small business set-asides and other socio-economic programs is available from the SADBUS and SBTA. See Section 5-5.33 for a discussion of the SADBUS and SBTA.

- L. Source Priorities for the Acquisition of Services. If the IHS requisition is for services, including construction services, IHS procedures require that the priority sources listed below must be checked first, and the services purchased from the highest rank order priority source, if possible, before considering procurement from a commercial source.

The priority order for consideration of vendor sources when procuring services is as follows:

- 1st -- Committee for Purchase from the Blind and Other Severely Handicapped,
- 2nd -- Indian-Owned/Economic Enterprises under the Buy Indian Act. (As of the date of this draft, this current priority for use of Indian-owned economic enterprises is under review. A revision to this current priority is anticipated in FY 1994.)
- 3rd -- Mandatory FSS and Mandatory GSA Term Contracts.
- 4th -- Optional FSS and Optional GSA Term Contracts.

(5-5.8 (L) Continued)

5th -- Federal Prison Industries, Inc. (UNICOR).

If the required services cannot be procured from any of these priority sources, then such services may be procured from an open-market commercial source.

The SADBUS or SBTAs may also identify sources as part of the small business/labor surplus set-aside review, as more fully described in the preceding Subsection K.

- M. Execution of an Award Document for Acquisition from a Priority Source. Purchase from a priority source requires completion, and use of Optional Form 347 -- Order for Supplies or Services, and then forwarding of the completed form to, the vendor. In each case, current pricing and delivery information should be obtained from the vendor before ordering.
- N. Execution of an Award Document for Acquisition from a Commercial Source. Purchase from a commercial source also requires completion of an award document, or use of other small purchase methods' as discussed under Subsection N -- Methods of Commercial Procurement, which follows.
- O. Methods of Commercial Procurement. Within the IHS there are several small purchase methods available to complete a procurement. These range from simplified techniques for low dollar purchases to the use of a standard purchase order. These methods include use of a Blanket Purchase Agreement, Imprest Fund, Standard Form 44--Purchase Order-Invoice-Voucher, and Optional Form 347.
- (1) Blanket Purchase Agreements. A Blanket Purchase Agreement (BPA) is the Government's equivalent of opening a charge account with a vendor. BPAs are used for reducing the paperwork for orders when there are repetitive needs for supplies or services from a given vendor, but exactly how many or when these supplies or services will be needed is unknown. BPAs are usually made with local firms, thus reducing the amount of time required for purchase and delivery, and minimizing the paperwork involved. BPAs may also be placed with FSS contractors as long as the agreement is consistent with the terms and conditions of the FSS agreement.
- BPAs may be made without a funded purchase requisition. A BPA may be limited to furnishing individual items or commodity groups or classes, or it may be unlimited for all items or services that the source of supply is in a position to furnish. (FAR 13.203(h)).

5.5-8 (0) Continued

The document to establish a BPA must contain the terms and conditions set forth in FAR 13.203-1(j). The FAR subsection requires a description of the agreement; extent of the Government's obligation; pricing statement; purchase limitation; notice of individuals authorized to purchase under the BPA; their dollar limitations by title of position, or name, and delivery ticket and invoice information. Additional requirements concerning the use of BPAs are contained in FAR 13.201; 13.203-1; 13.203-2; 13.204; 13.205, and 13.206.

Generally, orders against a BPA are placed orally, however, a purchase document (OF 347 -- Order for Supplies or Services) may be issued when necessary to insure a complete understanding of the transaction.

BPAs should be written with two or more firms in a given category. Then orders can be made with the firm offering the best price at the time an order is placed. If only one BPA is written in a given category, prices must be solicited from other firms for individual orders when the price of the individual order exceeds 10 percent of the small purchase limitation.

Reviews of existing BPAs shall be made annually by the CO who entered into the BPA, or by the CO's designated representative, to insure that authorized procedures are being followed. Changes in market conditions, sources of supply, and other factors may warrant making new agreements with different suppliers or modifying existing agreements.

- (2) Imprest Fund. An imprest fund is a cash fund of a fixed amount in the form of currency, or Government check administered by a delegated financial officer. The authorized agent (cashier) may issue cash or make payments as specified in his/her authorization. Imprest funds should be used whenever possible since this is a very economical means of purchase. In accordance with FAR 13.404(a), use of the imprest fund in HHS is limited to small purchase transactions that do not exceed \$500. Typical examples of use include:
- a. Readily available commercial items that can be obtained over-the-counter with immediate cash payments;
 - b. Emergency, fill-in, occasional, or special one-time purchases;
 - c. Single office machine repairs;
 - d. Purchase of stamps, transportation tokens, and C.O.D. charges;

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5.5-8 (0) Continued

- e . Purchase when vendors are reluctant to accept small purchase orders or are not equipped to bill using normal business policies.
- (3) SF-44 Purchase Order-Invoice-Voucher. The Standard Form 44 is a pocket size purchase order form. It is designed for on-the-spot over-the-counter purchases of supplies and nonpersonal services by authorized individuals. It is a multipurpose form that can be used as a purchase order, receiving report, invoice, and public voucher. Standard Form 44s may only be used when all of the following conditions are met:
 - a. The amount does not exceed \$2,500 (except in the case of public emergency);
 - b. The supplies or services are immediately available;
 - c. Only one delivery and one payment will be made; and
 - d. Its use is more economical and efficient than other purchasing methods.

The SF-44 is almost like a blank check and could be misused. Therefore, the responsible acquisition official who authorizes its use must maintain records of the serial numbers of each form, to whom it was issued, and the date of issue. Copies of the form not issued must be kept under lock and key. SF-44s are particularly effective for remote locations that have no other delegated procurement authority or for Government employees on travel who may have to purchase items for the Government.

- (4) Optional Form 347. When one of the three simplified techniques described above cannot be used, purchase orders are issued using the Optional Form 347 - Order for Supplies or Services. This is the most commonly used small purchase method.

The OF 347 is a multipurpose form that is designed for use as a purchase order, a receiving and inspection report, and an invoice. It is also used as a delivery order for acquisition under indefinite delivery contracts or from established Government sources. When used as a purchase order, the OF 347 must contain all the items and conditions applicable to the acquisition. When used as a delivery order under an existing contract, all information required for the acquisition, and not contained in the basic contract, must be included in the delivery order.

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5.8 (0) Continued¹

- (5) Purchase Card Use. The use of the U.S. Government credit card program, the International Merchant Purchase Authorization Card (IMPAC), has been approved for implementation in the IHS. All IHS Areas should be using the IMPAC by the end of FY 1995.
- P. Report Small Purchases. Small purchases are reported to the PORA on a quarterly basis using Standard Form 281 (Summary Contract Action Report). All small purchase awards are to be reported, except for the following:
 - (1) Government Bills of Lading and Government Transportation Requests;
 - (2) Training authorizations;
 - (3) Actions using non-appropriated funds (except for transactions involving Perry Point, which are to be reported);
 - (4) Interagency agreements;
 - (5) * Contracts under the small purchase limitation resulting in award of a contract using SF 26 --Award/Contract and SF 33-- Solicitation, Offer and Award, which are to be reported in the IHS Contracts Information System.

In FY 1994, an automated small purchase reporting system replaced the previous IHS manual system. This automated system compiles comprehensive data on IHS small purchases.

A summary chart that outlines the various steps in the IHS small purchase process is provided in Exhibit 5-5.8-B' which follows.

5-5.9 CONTRACT AWARD FILES--STRUCTURE, CONTENT, MAINTENANCE

- A. Policyspecific regulations concerning the maintenance of contract award files are found in FAR Subpart 4.8.
- B. General. The SC0 is responsible for establishing and maintaining files containing the records of all contractual actions. These files must be current and complete and constitute the "official" contract file. The file should contain all documentation relating to the solicitation, award, and contract administration. Completed contract files may be transferred to the records center as provided by the National Archives and Records Administration.
- C. Contents of Contract Files. Contract documents should be filed according to subject matter. The contract file should be numerically tabbed, filed in reverse order starting with first item (1) on the bottom of the file and the highest number on the top. Documents within each tab should be filed chronologically with the most recent document on top.

If any document is too voluminous to be placed under the applicable tab, it should be included in a separate file and the tab annotated with the location of the file. All of the items described in the contract file checklist will not always be needed for each contract. If a particular tab is not required, it should be omitted from that contract file and the checklist so noted. The file should be tabbed in accordance with the Standardized Contract File Checklist.

- D. Standardized Contract File Checklist. All IHS contracting offices shall use a Standardized Contract File Checklist established and provided by IHS, DCGP. This Standardized Contract File Checklist is included as Exhibit 5-5.9-A. The use of this checklist is required effective with the publication of this IHM Chapter.
- E. Contract Closeout Checklist. All IHS contracting offices shall use a standardized contract closeout checklist provided by IHS, DCGP. This standardized contract closeout checklist is included as Exhibit 5-5.9-B.

A-5 10 ARCHITECTURAL AND ENGINEERING CONTRACTING

- A. Overview. IHS acquisition of architectural and engineering services represents one of several procurement “special situations” for which special policies and procedures are prescribed in the FAR, HHSAR, and PHSAR.

Federal Regulations governing the acquisition of architectural and engineering (A&E) services are found in the FAR Subpart 36.6--Architect-Engineer Services. These policies and procedures reflect the requirements of Public Law 92-582, which is commonly referred to as the “Brooks Bill.” In addition, PHSAR Subpart 336.6 should be consulted regarding the development of a special document known as a Program of Requirements (POR) used for review, approval, and funding certification.

Public Law 92-582 requires that contracts for A&E services be based on competitive procedures, A&E contracts must be publicly announced and negotiated at fair and reasonable prices based on demonstrated competence and qualifications. FAR 36.601-2, Competition, states that competitive procedures include acquiring A&E services in accordance with the provisions of FAR 36.6. FAR 36.601-3 requires that A&E contractors shall be selected following the procedures in FAR 36.6--not the solicitation and source selection procedures in Parts 13, 14, and 15 of the FAR. An exception is provided under FAR 36.606(a) which indicates that A&E negotiations are to be conducted in accordance with the provisions of Part 15 of the FAR.

It is important to understand that cost or price is not a primary factor in the A&E selection process. FAR 15.903(d)(1)(ii) limits the fee for the production of designs, including plans, drawings, and specifications. The fee can be no more than six percent (6%) of the estimated cost of the construction (excluding the amount of the fee). This limitation applies only to design. It does not apply to services performed in the planning stage or for contract administration.

- B. Steps in the A&E Process. Many of the steps (e.g., preparing a synopsis for the CBD) are virtually identical to those utilized in non-A&E contracting. Therefore, only those steps of particular significance are discussed here. A summary flow chart of the A&E contracting process within the IHS is provided as Exhibit 5-5. IO-B at the end of this Section.

While the process used to select an A&E firm depends somewhat on the estimated amount of the contract, the basic principles are the same, regardless of the amount of the contract. It is also important to note that acquisitions for A&E services of \$25,000 or less are not considered to be small purchases within the context of FAR Part 13. Therefore, simplified purchase techniques, as defined by FAR Part 13, cannot be used.

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Instead, FAR 36.602-5 prescribes processes for the selection of A&E firms when the anticipated amount of the contract is not expected to exceed the small purchase limitation.

- C. Evaluation Board. FAR 36.602-2 requires the establishment of an Architect-Engineer Evaluation Board composed of members whose expertise includes architecture, engineering, construction, and related acquisitions. FAR 36.602-3 requires that the Evaluation Board shall review the current data files on eligible firms, evaluate the firms, and hold discussions with at least three of the most highly qualified firms and prepare a selection report for the selecting authority.
- D. BUY Indian Requirement. The requirement to hold discussions with at least three of the most highly qualified firms is a statutory requirement. Therefore, a Buy-Indian set-aside would not be proper unless it could be established that there were at least three qualified Indian-owned firms available to perform the service. If at least three qualified Indian-owned firms can be identified, the CBD synopsis shall state that the project is set-aside for Indian-owned firms.
- E. Identification of Qualified A&E Firms. Firms that are qualified to perform the service can be identified in one of two ways: (1) from the “Architect-Engineer and Related Services Questionnaire” (SF 254) and from the “Architect-Engineer and Related Services Questionnaire for Specific Project” (SF 255) received in response to the CBD synopsis, or (2) from SF 254s retained by the respective IHS Awarding Activities Office or the IHS Headquarters SADBUS. Frequently, A&E firms “market” their services by furnishing contracting offices with copies of their SF 254 in advance of a solicitation and update their SF 254 each year.

The Evaluation Board (see discussion under the preceding Subsection 5-5.74) identifies the firms that meet the basic requirement. Such firms identified as being the most highly qualified by the Evaluation Board are generally referred to as the “short list.” The expedited process provided in FAR 36.602-5 may be authorized for some awarding offices.

The CO sends each firm on the short list a letter advising such firms of their selection. The CO and the Evaluation Board then hold discussions with each firm on the short list. At the conclusion of these discussions, the Evaluation Board and the CO review the results of the discussions and the Board ranks the firms in order of priority and makes its recommendation to the Selection Authority.

(5-S. 10 Continued)

- F. Selecting the A&E Firm for Negotiation. Within the IHS, the designated A&E Selection Authority is the Director, Division of Facilities, Planning, and Construction at IHS Headquarters. The Selection Authority may change the order of priority; but if this is done, he or she must provide a written justification for the contract files for such action. The Selection Authority can question the inclusion of any or all firms on the short list and can return the list to the Evaluation Board for revision. In such case, however, the Selection Authority must advise the Evaluation Board of the reasons for such action.

In no event can the Selection Authority add firms to the selection report. If the Selection Authority does not believe that any of the firms are qualified or that the report is not adequate, the Selection Authority may return the report to the Evaluation Board with the reasons for such action clearly stated in writing, and require the Board to address the issue or issues.

After approval by the Selection Authority of the top ranked firm, the CO may release the name of the top ranked firm before issuing the RFP to that firm. However, this notification is required for all A&E contracts awarded under the Buy Indian or small business set-aside provisions.

- G. Negotiation and Award of Contract. The basic purpose of the RFP is to facilitate negotiations. The A&E firm will be required to submit a business proposal that addresses the amount and type of contract, along with supporting cost and pricing data. When firm requirements are identified in the RFP, the A&E firm also can be requested to furnish a technical proposal with design concepts, work schedules, and management plans. In addition, the technical proposal may cover personnel to be utilized, their experience and qualifications, and time they will devote to the project.

After the response to the RFP is received and evaluated, negotiations should be held with the firm selected for contract award. In the event a satisfactory price cannot be agreed upon with the highest ranked firm, the CO should obtain a written "best and final" offer from the firm and if the offer is not deemed acceptable, notify the firm of the termination of negotiations (FAR 36.606(f)). After notifying the A&E firm of the termination, the CO can initiate negotiations with the second ranked firm.

When an A&E award is being made on behalf of the IHS and its estimated value exceeds \$100,000, appropriate Awarding Activities Office must submit the proposed award to the Director, Division of Contracts and Grants Policy (DCGP) for preaward review and approval. Submission thresholds for all IHS Area Offices are provided under Exhibit 5.5-10-A which follows.

(5-5.10 (G) Continued)

This preaward review requirement applies to new contracts and modifications of existing contracts meeting or exceeding these thresholds except in the case of those priced options that were synopsized, evaluated, and reviewed by DCGP, at the time of contract award. During normal work periods, proposed awards must be submitted to DCGP for review no later than fifteen working days prior to the expected award date, unless the CO justifies the need and arranges for an expedited review by DCGP.

H. Indefinite Delivery Contract Term Length and Dollar Ceiling. When an Indefinite delivery contract (IDC) is used to acquire A&E services, the following special provisions apply concerning term length and dollar ceiling levels: -

- (1) The maximum basic A&E IDC term is one base year with four one-year options,
- (2) The maximum amount of an individual task or delivery order is \$300,000.
- (3) The maximum contract amount per year is \$1 million.
- (4) The maximum total contract award is \$5 million over a span of five years, assuming the exercise of the four option years.

5-5.11 CONSTRUCTION CONTRACTING

- A. Overview. IHS acquisition of construction services represents another of the procurement “special situations” for which special policies and procedures are prescribed in the FAR, HHSAR, and PHSAR.

FAR, Part 36 provides the primary coverage of the policies and procedures for construction contracting and takes precedence if there is a conflict between it and other parts of the FAR. As stated in FAR 36.101(b):

“When a requirement in this Part is inconsistent with a requirement in another part of this regulation, this Part 36 shall take precedence if the acquisition of construction or architect-engineer services is involved. ”

Other important FAR, HHSAR and PHSAR Parts and Subparts that impact construction contracting include:

- (1) FAR 12.2, Liquidated damages provisions;
- (2) FAR 19.9. Acquisition of construction using the Small Business Administrator’s Section 8(a) program;
- (3) FAR 22.4, Labor standards for contracts that involve construction; and
- (4) FAR 28.101 through 28.103, (PHSAR 380.503(c)(f)), Bid guarantee, performance, and payment bond requirements.

Construction is defined in FAR 36.102(d):

Construction means construction, alteration, or repair (including dredging, excavating, and painting) of buildings, structures, or other real property. For purposes of this definition, the terms buildings, structures or other real property include, but are not limited to, improvements of all types, such as’ bridges, dams, plants, highways, parkways, streets, subways, tunnels, sewers, mains, power lines, cemeteries, pumping stations, railways, airport facilities, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, canals, and channels. Construction does not include the manufacture, production, furnishing, construction, alteration, repair, processing, or assembling of vessels, aircraft, or other kinds of personal property.

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(5-5.11 (A) Continued)

FAR 22.401 uses a different definition of construction to determine what labor standards apply to a contract. In this definition, the “site of the building or work” is very important in determining the use of the contract labor standards.

The definition is as follows:

Construction, alteration or repair, as used in this subpart, means all types of work done on a particular building or work at the site thereof, including, without limitation, altering, remodeling, installation (if appropriate) on the site of the work of items fabricated off-site, painting and decorating, the transporting of materials and supplies to or from the building or work by the employees of the construction contractor or construction subcontractor, and the manufacturing or furnishing of materials, articles, supplies, or equipment on the site of the building or work by persons employed by the contractor or subcontractor.

- B. Construction Planning. Within the IHS, acquisition planning is required for all new construction acquisitions over \$25,000, in accordance with Section 5 of this Manual chapter. Although construction is normally obtained using the Sealed bidding method of acquisition, certain construction requirements are met utilizing Negotiated acquisition methods.
- C. Steps in the Process. The flow charts at the end of this chapter illustrate the normal process for Sealed bidding (Exhibit 5-5.11-B) and Negotiated construction (Exhibit 5-5.11-C) contracts, and provide approximate construction acquisition timeframes for each step.
- D. The Davis-Bacon Act. The Davis-Bacon Act was originally enacted in 1931 to prevent Federal construction projects from depressing the wages in the locality where the construction was taking place. The law applies to all Government contracts involving the employment of laborers or mechanics in the construction, alteration, or repair of public buildings or public works when the contract is estimated to exceed \$2,000.00. The Act authorizes the Secretary of Labor to determine the prevailing wages and to set the minimum wages to be paid when Federal funds are used to finance construction.

There are two types of wage determinations issued by the Secretary of Labor: general wage determinations and project wage determination, which are defined as follows :

(5-S. 11 (D) Continued)

- (1) A general wage determination has prevailing wage rates to be used in a specific geographic area. It lists the types of construction covered by the determination, e.g., heavy, highway, building, etc. General wage determinations remain valid until modified, superseded, or canceled by notice in the Federal Register by the Department of Labor.
- (2) A project wage determination is issued on the request of Contracting Agency when no general wage determination applies. A project wage determination is only effective for 180 calendar days from the date of the determination.

FAR 22.404-3(c) states that a Contracting Agency should submit its request for a project wage determination to the Department of Labor “at least 45 days (60 days if possible)” before issuing the solicitation. It points out, however, that the time required for processing varies according to the facts and circumstances in each case.

Requests must be submitted on an SF 308, Request for Determination and Response to Request. Send requests to:

Department of Labor
Administrator
Wage and Hour Division
Washington, D.C. 20212
Attention: Construction Contract Wage Determinations

The location of the construction project will determine if it is covered by a general wage determination or if a project wage determination must be requested.

FAR Subpart 22.4, Labor Standards for Contracts Involving Construction, describes the methods to be used for determining wage rates for the contract. In certain instances where a modification may be required, FAR 22.404-6, Modifications of Wage Determinations, must be reviewed to see if a wage rate must be included in the solicitation and resulting contract.

E. Enforcement of Labor Standards. Under the Davis-Bacon Act, the Contracting Officer must ensure that:

- (1) Employees are paid in accordance with the rates established by the Secretary of Labor ;
- (2) Employees are correctly classified;

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J5-5.11 (El Continued)

- (3) Time and one-half is paid for every hour worked in excess of 40 hours per week;
- (4) There are no unauthorized deductions made from employee wages;
- (5) Employees are paid weekly;
- (6) The contractor submits weekly payrolls that have been properly certified for its employees and subcontractors;
- (7) The Government retains these for a period of not less than three years.

If apprentices are used, the contractor must have an apprenticeship program that is registered with the Department of Labor or a State apprenticeship agency. Wage determinations do not include wage rates for apprentices. These are included in the registered program and are usually based on prevailing State apprentice scales.

The ratio of apprentices to journeymen must not exceed those included in the registered program. On site interviews should be made of employees on a random basis to be certain they are being properly classified and paid.

- F. Buy Indian Policy. The Buy Indian Act and its effects on IHS acquisitions, including construction acquisitions, are discussed in detail in Section 6 of this Chapter.
- G. Presolicitation Notice. The CO shall send presolicitation notices to prospective bidders on any IHS construction requirement when the proposed contract is expected to equal or exceed \$100,000, unless this requirement is waived by the HCA or his/her designee. Presolicitation notices are optional for construction contracts expected to be less than \$100,000. In accordance with FAR 36.302, presolicitation notices are to be issued sufficiently in advance of the invitation for bids in order to attract the interest of the largest number of prospective bidders.

A presolicitation notice for a construction requirement shall:

- (1) Describe the proposed work in sufficient detail to disclose the nature and volume of work;
- (2) State the location of the work;
- (3) Include tentative dates for issuing bid invitations, for bid opening, and for completing contract performance;

15-5.11 (G) Continued

- (4) Indicate where plans will be available for inspection without charge;
 - (5) Specify a date for requesting the invitation for bids;
 - (6) Notify recipients that do not choose to submit a bid that they must notify the issuing office as to whether they wish to receive future presolicitations notices;
 - (7) Indicate whether the award is restricted to small business;
 - (8) Specify the amount of charge, if any, for presolicitation documents, and
 - (9) Be published in the CBD.
- H. Additive or Deductive Bid Items. When it appears that funds available for a project may be insufficient for all the desired features of construction, the CO may provide in the solicitation for a base bid item covering the work generally as specified and for one or more additive or deductive bid items which progressively add or omit specified features of the work in a stated order of priority.
- I. Determination of Time for Bid Preparation. FAR 36.303(a) states that invitations for bids for construction shall allow sufficient time to prepare and submit a bid. This must include time to investigate the site conditions, examine the data, and obtain subcontractor bids.

FAR 14.202-1(a) requires that a minimum bidding time (i.e., the time between the issuance of the solicitation and the opening of the bids) of at least 30 days be provided when a synopsis is required, as specified under FAR 5.2.

This latter section simply requires sufficient bid preparation time. The question then becomes, what is sufficient bid preparation time? There is no rule of thumb or formula that can be applied because there are so many factors involved.

Although 30 days might be sufficient time for a relatively small, uncomplicated project, it would not be sufficient time for a large or complex project requiring subcontractors, or imposing numerous other time consuming aspects.

The goal is to allow sufficient time for the bidders to fully prepare their bids and to avoid “contingency” bidding.

(5-5.11 Continued)

- J. Bonding. The “Miller Act” requires performance and payment bonds for construction contracts over \$25,000. FAR 28.102-1(b) requires the contractor to have bonds before they receive the notice to proceed to start work under a contract. Failure to provide required bonds may result in the construction bid being determined as non-responsive.

FAR 28.101-1(a) requires a bid guarantee when a performance bond or a performance and payment bond is required. The Miller Act sets the amount of a bid guarantee at 20% of the contractor’s bid price (see FAR 28.101 j. The amount of the payment bond varies depending on the size of the contract (see FAR 28.102-2 for further guidance). The penal amount for performance bonds is indicated in FAR 28.102(a).

The CO shall insure that all bonds are reviewed carefully for compliance with the requirements of the solicitation. The corporate surety that provides the bond must also be on the list of companies accepted by the Federal Government. The list is found in the Department of Treasury Circular 570, Companies Holding Certificates of Authority as Acceptable Sureties on Bonds and Acceptable Reinsuring Companies. This list is published in the Federal Register on July 1st of each year, although it also may be updated periodically throughout the year.

Individual sureties should also be carefully reviewed to be certain they meet the requirements of FAR 28.203. Special attention should be given to FAR 28.203-2, Acceptability of Assets, In accordance with FAR 28.203(f), the CO shall obtain the opinion of the HHS Office of General Counsel as to the adequacy of the documents pledging the assets of an individual surety prior to accepting the bid guarantee and performance and payment bond.

The Comptroller General has held that if the Contracting Officer decides that an individual surety in support of a bid bond is unacceptable, the bidder shall be rejected as nonresponsive. In this instance, the determination does not have to be referred to the Small Business Administration for a competency review.

FAR 28.204, 28.204-1. and 28.204-2 address optional types of securities that can be furnished by a contractor in lieu of a surety bond. Such optional securities include United States bonds or notes, certified or cashiers checks, post office money orders, or currency in an amount equal to the penal sum of the bonds. This section should be consulted when something other than a surety bond is furnished.

The bond and related forms are listed in FAR 28.106-1. A bid bond will sometimes be submitted on a corporate surety form. In such cases, carefully review the bond to be certain it does not diminish the Government rights set forth on the SF 24, Bid Bond. If it is acceptable, the contract’s bid can be accepted. If it is not acceptable,

(5-5.1 I (J) Continued) ,

the bid must be rejected as nonresponsive to the solicitation. If the CO determines it is necessary, the matter should be referred to General Counsel before rejection of the bid.

- K. Insurance. FAR 28.3 indicates the various contractor requirements regarding insurance coverage.

In general, contractors shall be required to carry insurance under the following general circumstances:

- (1) The contractor is subject to Cost Accounting Standard (CAS) 416 (see 4 CFR 416) and is required to obtain insurance, either by purchase or self-coverage, for perils to which the contractor is exposed, except in cases where specified contractual indemnities or other limitations apply (as detailed under FAR 28.301(a)).
- (2) The contractor is required by law or regulation to provide insurance for certain types of perils, such as workers' compensation, whether or not subject to CAS 416. Insurance is also mandatory when commingling of property; type of operation; circumstances of ownership, or condition of the contract make it necessary for the protection of the Government. (Consult FAR 28.301(b) for further requirements regarding minimum insurance amounts, multi-agency involvement, and other matters.)
- (3) The contractor is awarded a non-personal services contract for health care services and is therefore required to maintain medical liability insurance and to indemnify the Government for liability producing costs or omissions by the contractor, IHS employees, or agents. (See FAR 28.301(c)).

FAR 28.3 contains a number of additional requirements and instructions that apply to various specific contract situations. These provisions should be reviewed by the CO for their possible applicability to each construction contract.

- L. Opening of Bids. FAR 14.402, Opening of Bids, should be reviewed by the designated Bid Opening Officer before the time set for bid opening arrives.

FAR 14.402 describes the proper procedures for the handling of bids prior to bid opening, at bid openings, and after bid opening. Late bids submitted should be handled in accordance with FAR 14.304.

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- M. Determining Offer or Responsibility. There are several things that must be taken into consideration when determining the responsibility of an offeror. The first is the offeror's capability to perform the work. This includes the offeror's availability to perform within the time specified in the solicitation. The second is whether the offeror has the financial resources to carry out the work pending receipt of payment from the Government. The last is the contractor's past performance. This record should be examined to determine whether the company has demonstrated business integrity.

None of the above requirements are specific to construction. The principles of responsibility are the same for all acquisitions involving supplies and services and are explained in Subsection 5-5.711.

- N. Responsiveness Versus Responsibility. In Sealed bidding, it is important to distinguish responsiveness from responsibility. The apparent responsiveness of the bid is ascertained from the bid itself, not from extrinsic evidence or other information furnished by the contractor.

In contrast, responsibility focuses on the bidder's ability to perform as promised. Responsibility includes the bidder's capacity, credit, experience, integrity, past performance and overall ability to perform. If the bidder is a small business, the special determinations described in Subsection 5-5.5U also must be considered.

The CO determines whether a bid is responsive to the solicitation. The bidder, however, can protest such determinations to the agency or to the GAO.

- O : Preaward Review and Approval. When a construction award is being made on behalf of the IHS and the estimated value of the award (including option amounts) exceeds the authorized approval level, the Offices of Engineering Services (OES) must submit the proposed award to the Director, DCGP, IHS, for preaward review and approval. This preaward review requirement applies to new contracts and modifications of existing contracts meeting or exceeding these thresholds except in the case of those priced options that were synopsisized, evaluated, and reviewed by DCGP, at the time of contract award.

Proposed awards must be submitted for review no later than fifteen working days--during normal working periods--prior to the expected award date, unless the cognizant CO justifies the need and arranges for an expedited review.

(5-5.1.1 (0) Continued)

In the case of construction awards made by IHS Awarding Activities Offices, the preaward review threshold is as stated in Exhibit 5-5.11-A "Preaward Review and Approval Levels by IHS Contracting Offices." This Area preaward review threshold is applicable to all types of Area construction awards, including Public Law 93-638 construction awards.

This IHS preaward review and approval construction award policy supplements HHSAR 304.7101 and PHSAR 304.7101.

- P. Preconstruction Conference. The contractor may be given Notice to Proceed (NTP) after all the contract documents have been prepared, the legal and other reviews have been obtained, the contract has been awarded, and performance and payment bonds and verification of insurance coverage have been obtained. Frequently, however, it is valuable to hold a post award or preconstruction conference before the NTP is given.

A preconstruction conference is an opportunity for the parties that will be directly involved in the contract to become acquainted, both personally and in terms of their roles, responsibilities, and authorities. It is a good time to establish lines of communication and discuss issues that need to be clarified.

Unless that authority is delegated to the PO, the CO has the responsibility to coordinate the preconstruction conference. An agenda should be developed and a planning session held before the conference. During the planning session, the chairperson for the conference should be selected and the participants' roles and responsibility for responding to questions should be discussed.

Those invited to attend should include the principal representative of the prime contractor, the prime contractor's superintendent, a representative of each major subcontractor (if the prime agrees), a representative of the Tribal Employee Rights Office (if the construction project is on or near an Indian reservation), and such Government representatives as the CO and the PO feel are needed.

A record of what is covered during the conference should be made and, at the conclusion, a copy should be furnished to all who attended. They should review the record and advise of any additions, deletions, or disagreements they might have. The record should be corrected accordingly, provided corrections are warranted.

- Q- Summary Chart: Sealed Bid Construction.

A summary chart that outlines the various steps in the IHS Sealed bidding construction contracting process is provided in Exhibit 5-5.1 I-B that follows.